SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 94

THE UNITED STATES, PETITIONER

vs.

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL.

No. 96

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL., PETITIONERS

vs.

THE UNITED STATES.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims of the United States

No. 45861

N. Y. RAYON IMPORTING CO., INC. (#2), AND ALFRED L. ROSE, NORMAN S. GOETZ, WALTER MENDELSOHN AND BERNARD D. LANG, AS LIQUIDATING DIRECTORS AND TRUSTEES OF N. Y. RAYON IMPORTING CO., INC. (#2), PLAINTIFFS, AND SOCIETE POUR NOUVEAUX PLACEMENTS DE CAPITAUX, IMPLEADED PLAINTIFF, *v.* THE UNITED STATES, DEFENDANT

History of proceedings

The original petition was filed on April 29, 1943.

On defendant's motion and pursuant to an order of the Court dated December 8, 1943, Societe Pour Nouveaux Placements De Capitaux was added as a party plaintiff in this suit by the filing of an amended petition on January 21, 1944, which is as follows:

Amended petition

Filed January 21, 1944

To the Honorable Court of Claims of the United States and the Honorable Judges Thereof:

The plaintiffs, N. Y. Rayon Importing Co., Inc. (#2), and Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn and Bernard D. Lang as liquidating directors and trustees of N. Y. Rayon Importing Co., Inc. (#2), by their attorneys, Proskauer Rose, Goetz & Mendelsohn respectfully show, on information and belief:

I. Plaintiff, N. Y. Rayon Importing Co., Inc. (herein
2 called "Rayon #2"), is a corporation duly incorporated under the Laws of the State of New York on March 1, 1930, with its principal office at New York City, New York.

II. Rayon #2 was duly dissolved on January 9, 1931, by the filing of a Certificate of Dissolution with the Secretary of State of the State of New York in compliance with Section 105 of the New York Stock Corporation Law, but pursuant to the provisions of Section 105, subdivision 8, of the said New York Stock Corporation Law, Rayon #2 continues to exist for the purpose of collecting and distributing its assets, doing all other acts required to adjust and wind up its business and affairs and suing in its corporate name.

III. At the time of the dissolution of Rayon #2 its directors were the plaintiff, Alfred L. Rose, one Max Spinnler and one Hartley Robbins, and there was one vacancy in the membership of the Board of Directors by reason of the death of Heinrich Keller, also known at Heinrich Keller-Gull.

IV. Said Heinrich Keller, also known as Heinrich Keller-Gull, died on or about December 9, 1930, said Max Spinnler died on or about April 1, 1935, and said Hartley Robbins died on or about May 25, 1938.

V. From on or about May 25, 1938, the plaintiff, Alfred L. Rose, was the sole surviving director of the directors in office at the time of the aforesaid dissolution of Rayon #2 and as such is hereafter referred to as the "sole surviving liquidating director and trustee" of Rayon #2.

VI. At a meeting of the Board of Directors of Rayon #2
3 held on June 10, 1938, the said Alfred L. Rose, as sole surviving liquidating director and trustee of Rayon #2 elected the plaintiff, Norman S. Goetz, as a director of Rayon #2 to fill the vacancy caused by the death of said Max Spinnler; said Norman S. Goetz thereupon entered the meeting and took his place as a director and together with the plaintiff, Alfred L. Rose, elected the plaintiff, Walter Mendelsohn, as a director of Rayon #2 to fill the vacancy caused by the death of said Heinrich Keller, also known as Heinrich Keller-Gull; said Walter Mendelsohn thereupon entered the meeting and took his place as a director and, together with the plaintiffs, Alfred L. Rose and Norman S. Goetz, elected the plaintiff, Bernard D. Lang as a director of Rayon #2 to fill the vacancy caused by the death of said Hartley Robbins.

VII. At all times since June 10, 1938, the plaintiff, Alfred L. Rose, as the sole surviving liquidating director and trustee of Rayon #2 and the plaintiffs, Norman S. Goetz, Walter Mendelsohn and Bernard D. Lang, were and still are the duly authorized liquidating directors and trustees of Rayon #2, and the plaintiff Alfred L. Rose, sues in his representative capacity as the sole surviving liquidating director and trustee of Rayon #2, and with him the other directors of Rayon #2, the plaintiffs, Norman S. Goetz, Walter Mendelsohn and Bernard D. Lang sue in their representative capacities as coliquidating directors and trustees of Rayon #2.

VIII. N. Y. Rayon Importing Co., Inc. (hereinafter called Rayon #1) is a corporation duly incorporated under the Laws of the State of New York on April 26, 1923, and was duly dissolved
4 on March 1, 1930, by the filing of a Certificate of Dissolution with the Secretary of State of the State of New York in compliance with Section 105 of the New York Stock Corporation Law.

IX. Nyrayco Importing & Converting Corporation (hereinafter called "Nyrayco") is a corporation duly incorporated under the Laws of the State of New York on January 30, 1928, and was dissolved by proclamation *or* or about December 16, 1935, for non-pay-

ment of franchise taxes pursuant to Section 203(a) of the New York Tax Law.

X. From the dates of their incorporation and up to and including March 1, 1930, Rayon #1 and Nyrayco were engaged in the business of importing and/or selling and/or distributing rayon. During the years 1925, 1926, and 1927, Rayon #1, and during the years 1928 and 1929 Rayon #1 and Nyrayco paid large sums of money for customs duties which had been assessed and collected on shipments of rayon yarn imported by them, against which assessments, claimed by said Rayon #1 and Nyrayco to be erroneous and illegal, protests were duly filed by and on behalf of said corporations under Section 514 of the Tariff Act of 1922.

XI. On or about March 1, 1930, an agreement was entered into between the owners of all of the issued and outstanding stock of Rayon #1, Nyrayco and of two other corporations known as Rayseta Yarns Corp. (hereinafter called "Rayseta"), a New York corporation, and Rayonese Yarns Corp. (hereinafter called "Rayonese"), a New Jersey corporation, to effect a reorganization of said corporations by which all of the assets, liabilities and business of the said four corporations would be transferred to and united into one corporation and the business conducted as a single corporate entity.

XII. The plaintiff, Rayon #2, was incorporated on March 1, 1930, in order to acquire all of the assets, and to assume all the liabilities, of Rayon #1, Nyrayco, Rayseta and Rayonese, pursuant to the aforesaid plan of reorganization. Thereafter, between the months of March and June, 1930, inclusive, the plaintiff Rayon #2 acquired all of the issued and outstanding shares of stock of Rayon #1, Nyrayco, Rayseta and Rayonese and acquired the business and all of the assets of said four predecessor corporations, including the ownership of the aforesaid claims for refunds of excessive customs duties theretofore filed by Rayon #1 and Nyrayco, in consideration of the assumption by the plaintiff Rayon #2 of all of the liabilities of said four predecessor corporations and the issuance by it of all of the shares of its capital stock then to be outstanding.

XIII. At the conclusion of said reorganization, the owners of the stock of Rayon #1, Nyrayco, Rayseta and Rayonese continued to be the owners of the stock of plaintiff, Rayon #2, in amounts equal to their holdings of stock in said predecessor corporations.

XIV. Thereafter, the protests filed by Rayon #1 and Nyrayco, as aforesaid, came on for hearing and decision by the United States Customs Court in 1937, at a time when, in accordance with the laws of the State of New York and the decisions of the courts of State of New York, then in force and effect, Rayon #1, although dis-

solved under Section 105 of the New York Stock Corporation Law, continued to exist pursuant to said Section 105, and at a time when Nyrayco, although dissolved under Section 203 (a) of the New York Tax Law, continued to exist pursuant to Section 29
6 of the New York General Corporation Law, for the purpose of suing in their respective corporate names. On or about April 30, 1937, and May 6, 1937, respectively, said United States Customs Court rendered two judgments on said protests, sustaining the claims of said Rayon #1 and Nyrayco and directing a reliquidation accordingly of the customs entries covering the said shipments of rayon yarns. As the result of said judgments and the reliquidation of the customs entries made pursuant thereto by the Collector of Customs at the Port of New York, said Rayon #1 became entitled to refunds in the sum of $362,482.71, and said Nyrayco became entitled to refunds in the sum of $30,809.75.

XV. By reason of the foregoing, and the aforesaid transfer of all of the assets of Rayon #1 and Nyrayco to plaintiff, Rayon #2, at the time of the entry of said judgments and the reliquidation of the customs entries made pursuant thereto, Rayon #1 and Nyrayco became entitled to refunds respectively in the said sums of $362,482.71 and $30,809.75 each for the use of plaintiff, Rayon #2.

XVI. Said refunds were duly certified by the Collector of Customs at New York to the proper disbursing officer for payment, and checks covering said refunds were drawn by an authorized disbursing officer on the Treasurer of the United States, payable to the order of Rayon #1 and Nyrayco, and duly delivered to said Collector of Customs. Annexed hereto, marked Exhibit A, is a schedule of said checks, issued in the name of Rayon #1, in the aggregate sum of $362,482.71, said checks having been drawn on various dates from, and including August 4, 1937, to, and including Febru-
ary 3, 1938; and annexed hereto, marked Exhibit B, is
7 a schedule of said checks, issued in the name of Nyrayco, in the aggregate sum of $30,809.75, said checks having been drawn on various dates from and including August 30, 1937 to and including January 26, 1938. Appropriations for the refund or payment of customs collections or receipts for the fiscal year ending June 30, 1938, were duly made by Congress by the Act of May 14, 1937 (50 U. S. Stat. 137, at 142) and the Act of June 25, 1938 (52 U. S. Stat. 1114, at 1149). Said checks were forwarded by the customs officials or other Federal officials at New York, N. Y., to the General Accounting Office at Washington, D. C., for lawful disposition, in view of the fact that, at the time of drawing said checks, Rayon #1, Nyrayco and Rayon #2 were dissolved corporations.

XVII. Thereafter, the General Accounting Office withheld approval of the delivery of said checks or the proceeds thereof to the plaintiff, Rayon #2, because of alleged doubts it claimed to have as to the propriety of the delivery of such checks or the proceeds thereof, and invited submission of further information relative thereto, which information was duly furnished. After more than a year had elapsed from the date of their issue, the aforesaid checks or the proceeds thereof were reported by said General Accounting Office to be deposited in the Treasury to the credit of the trust fund account entitled "Outstanding Liabilities, 1938" pursuant to the provisions of Title 31 of the United States Code, Section 725t; the balances of which trust fund account are available to pay claims on account of said checks. Claims for said checks were made before the expiration of two fiscal years after the deposit thereof.

8 XVIII. The United States is now wrongfully and unlawfully withholding from the plaintiff, Rayon #2, and from the plaintiff, Alfred L. Rose, as the sole surviving liquidating director and trustee of Rayon #2 and from the other directors of Rayon #2, the plaintiffs Norman S. Goetz, Walter Mendelsohn and Bernard D. Lang, as co-liquidating directors and trustees of Rayon #2, without their consent and against their will, although duly demanded by them, the above amount of $393,292.46 with interest thereon, and has wrongfully and unlawfully refused to pay the same, and claim is made for the said amount of $393,292.46 with interest thereon.

XIX. No other action has been had on said claims in Congress or by any of the departments, except as aforesaid. The plaintiff, Rayon #2, and the individual plaintiffs are the owners of the claims herein referred to and have not assigned or transferred the whole or any part thereof or interest therein to any other person, firm or corporation. The plaintiff, Rayon #2, the individual plaintiffs and Rayon #1 and Nyrayco, the predecessors of Rayon #2, are citizens of the United States and have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government. The plaintiff, Rayon #2, and the individual plaintiffs believe the facts stated herein to be true and that they are justly entitled to the amount claimed from the United States after allowing all just credits and offsets.

9 DISCLAIMER AND CONSENT OF IMPLEADED PLAINTIFF, SOCIETE POUR NOUVEAUX PLACEMENTS DE CAPITAUX

The impleaded plaintiff, Societe Pour Nouveaux Placements de Capitaux, by its attorneys, Proskauer Rose Goetz & Mendelsohn, respectfully shows, on information and belief:

XX. Societe Pour Nouveaux Placements de Capitaux (herein called "Societe") is a corporation organized and existing under the laws of the Republic of Switzerland, which is a Government that accords to the citizens of the United States the right to prosecute claims against the Republic of Switzerland in its courts.

XXI. The action heretofore instituted by the plaintiffs in Docket No. 45862 was consolidated with the action heretofore instituted by the plaintiffs in Docket No. 45861 by order of this Court dated June 9, 1943, and the action heretofore instituted by the plaintiff in Docket No. 45863 was similarly consolidated with the action instituted by the plaintiffs in Docket No. 45861 by order of this Court dated June 9, 1943. This amended petition is filed pursuant to order of this Court dated December 8, 1943, requiring Societe to be added as a party plaintiff to each of the above referred to causes.

XXII. Up to March, 1930, Societe was the owner of 850 shares of the outstanding stock of Nyrayco Importing & Converting Corporation (herein called "Nyrayco"), the corporate plaintiff in Docket No. 45863. Thereafter, between March and June, 1930 inclusive, N. Y. Rayon Importing Co., Inc. (herein called "Rayon #2"), the corporate plaintiff in Docket No. 45861, became and still is the owner of all the shares of outstanding stock of Nyrayco and of N. Y. Rayon Importing Co., Inc. (herein called "Rayon #1"), the corporate plaintiff in Docket No. 45862 and Societe became and still is the owner of all the shares of outstanding stock of Rayon #2.

XXIII. By virtue of its stock ownership as aforesaid, Societe will be the ultimate beneficiary of the proceeds of the customs refunds determined to be due by judgments of the United States Customs Court dated April 30, 1937 and May 6, 1937, to the same extent, whether the said proceeds are received either by the plaintiffs in Docket No. 45861 on the one hand or by the plaintiffs in Docket Nos. 45862 and 45863 on the other hand.

XXIV. Societe disclaims having any demand or claim in its own name against the United States in the subject-matters and controversies involved in each and all of the actions, Docket Nos. 45861, 45862 and 45863 and consents to be bound and concluded by the judgments to be entered in said actions.

WHEREFORE, the plaintiff, Rayon #2, and the individual plaintiffs pray that the plaintiff, Rayon #2, and the plaintiff, Alfred L. Rose, as the sole surviving liquidating director and trustee of Rayon #2, and the plaintiffs, Norman S. Goetz, Walter Mendelsohn and Bernard D. Lang, as the co-liquidating directors and trustees of Rayon #2 have judgment against the United States

of America in the sum of $393,292.46, with interest as provided by law, and their costs herein; and

11 Wherefore, Societe Pour Nouveaux Placements de Capitaux prays that the rights of the parties be determined and consents to be bound and concluded by the judgment to be entered in this action, Docket No. 46861.

PROSKAUER, ROSE, GOETZ & MENDELSOHN,
By WILBUR H. FRIEDMAN,
A Member of the Firm,
Attorneys for Plaintiffs, N. Y. Rayon Importing Co., Inc. (#2) and Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn, Bernard D. Lang as liquidating directors and trustees of N. Y. Rayon Importing Co., Inc. (#2)

PROSKAUER, ROSE, GOETZ & MENDELSOHN,
By WILBUR H. FRIEDMAN,
A Member of the Firm,
Attorneys for Impleaded Plaintiff, Societe Pour Nouveaux Placements de Capitaux, Office & Post Office Address, 11 Broadway, New York, N. Y.

12 *Exhibit A to amended petition*

Checks for refunds of excessive customs duties drawn on the Treasurer of the United States by G. F. Allen, Chief Disbursing Officer in favor of N. Y. Rayon Importing Co., Inc. (Rayon #1).

Check No.	Date of check	Voucher No.	Amount	Symbol No.
78050	8- 4-37	Vo 2-12108	$7,388.90	13-767
79546	8-25-37	Vo 2-20730	226.50	"
79882	8-30-37	Vo 2-22038	9,340.20	"
79885	8-30-37	Vo 2-22039	9,060.81	"
80197	9- 3-37	Vo 2-24662	3,481.50	"
80222	9- 3-37	Vo 2-24664	2,994.25	"
80526	9- 4-37	Vo 2-24788	1,212.10	"
80554	9- 4-37	Vo 2-24790	848.80	"
80555	9- 4-37	Vo 2-24790	317.02	"
80602	9- 4-37	Vo 2-24793	2,004.55	"
80603	9- 4-37	Vo 2-24793	1,851.45	"
80608	9- 4-37	Vo 2-24794	997.68	"
81336	9-14-37	Vo 2-27952	9,974.60	"
81142	9-14-37	Vo 2-27954	1,739.20	"
81362	9-16-37	Vo 2-28960	8,622.05	"
81414	9-16-37	Vo 2-28965	374.35	"
81418	9-16-37	Vo 2-28965	594.80	"
81419	9-16-37	Vo 2-28965	14,631.40	"
81843	9-21-37	Vo 2-30414	5,945.15	"
82769	9-30-37	Vo 2-35060	6,722.26	"
82798	9-30-37	Vo 2-35062	10,870.00	"
82924	9-30-37	Vo 2-35065	4,149.30	"
82976	9-30-37	Vo 2-35067	4,754.10	"
83039	9-30-37	Vo 2-35071	8,067.40	"
83043	9-30-37	Vo 2-35072	16,432.05	"
83133	9-30-37	Vo 2-35071	1,868.10	"
84091	10-21-37	Vo 2-44079	8,227.70	"
84026	10-21-37	Vo 2-44080	8,542.95	"
84168	10-21-37	Vo 2-44091	16,989.35	"
84235	10-21-37	Vo 2-44096	12,688.40	"

Check No.	Date of Check	Voucher No.	Amount	Symbol No.
13 84703	10-21-37	Vo 2-44175	$11, 804. 00	12-767
85277	10-22-37	Vo 2-44963	7, 504. 80	"
85279	10-22-37	Vo 2-44964	4, 273. 52	"
85974	10-29-37	Vo 2-47673	498. 85	"
85804	10-29-37	Vo 2-47666	13, 912. 90	"
86601	11- 4-37	Vo 2-50407	20, 980. 20	"
86738	11-10-37	Vo 2-52751	22, 445. 65	"
86740	11-10-37	Vo 2-52752	28, 677. 60	"
86783	11-10-37	Vo 2-52755	920. 80	"
86886	11-10-37	Vo 2-52764	693. 05	"
87410	11-10-37	Vo 2-52802	5, 561. 40	"
87444	11-10-37	Vo 2-52804	3, 061. 30	"
89011	11-23-37	Vo 2-59218	1, 135. 75	"
89930	12- 1-37	Vo 2-62417	3, 334. 00	"
90834	12- 9-37	Vo 2-65395	4, 878. 65	"
91597	12-20-37	Vo 2-69958	10, 267. 95	"
91598	12-20-37	Vo 2-69958	1, 862. 90	"
92952	12-29-37	Vo 2-72486	8, 701. 35	"
93908	1- 7-38	Vo 2-76094	1, 138. 30	"
96206	1-25-38	Vo 2-83200	19, 485. 60	"
95163	1-18-38	Vo 2-80079	2, 933. 75	"
96313	1-26-38	Vo 2-83749	6, 639. 95	"
92267	2- 3-38	Vo 2-86986	2, 033. 45	"
			362, 482. 71	

14 *Exhibit B to amended petition*

Checks for refunds of excessive customs duties drawn on the Treasurer of the United States, by G. F. Allen, Chief Disbursing Officer, in favor of Nyrayco Importing and Converting Corporation (Nyrayco).

Check No.	Date of Check	Voucher No.	Amount	Symbol No.
79888	8-30-37	Vo 2-22039	$121. 25	12-767
81419	9-16-37	Vo 2-28964	816. 15	"
81871	9-21-37	Vo 2-30416	12, 698. 95	"
83045	9-30-37	Vo 2-35072	385. 45	"
83046	9-30-37	Vo 2-35072	304. 15	"
83090	9-30-37	Vo 2-35075	4, 988. 25	"
84238	10-21-37	Vo 2-44096	5, 183. 95	"
84707	10-21-37	Vo 2-44176	650. 35	"
86787	11-10-37	Vo 2-52755	1, 896. 20	"
87409	11-10-37	Vo 2-52802	892. 65	"
96306	1-26-38	Vo 2-83748	2, 824. 40	"
			30, 909. 75	

15 [*Duly sworn to by Wilbur H. Friedman; jurat omitted in printing.*]

17 *General traverse*

Filed March 1, 1944

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant

herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

FRANCIS M. SHEA,
Assistant Attorney General.

DBM.
EEE.

Argument and submission of case

On December 3, 1945, the case was argued and submitted on merits by Mr. Eugene Eisenmann for plaintiff, and by Mr. D. B. MacGuineas for defendant.

19 *Special findings of fact, conclusion of law and opinion of the court by Jones, J.*

Filed February 4, 1946.

Mr. Eugene Eisenmann for the plaintiffs and impleaded plaintiff. Proskauer, Rose, Goetz & Mendelsohn and Mr. Albert L. Solodar were on the briefs.

Mr. Donald B. MacGuineas, with whom was Mr. Assistant Attorney General John F. Sonnett for the defendant.

20 This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special findings of fact

1. N. Y. Rayon Importing Co., Inc. (hereinafter called "Rayon #1"), one of the plaintiffs in Docket No. 45862, is a dissolved New York corporation which was duly incorporated on April 26, 1923, with its principal office in New York City, under the name of N. Y. Artificial Silk Importing Co., Inc. By certificate duly filed on May 4, 1925, it changed its name to N. Y. Rayon Importing Co., Inc. Pursuant to its certificate of incorporation, as duly amended July 7, 1927, it issued 500 shares of its capital stock of the par value of $100 each.

2. Nyrayco Importing & Converting Corporation (hereinafter called "Nyrayco"), the plaintiff in Docket No. 45863, is a dissolved New York corporation which was duly incorporated on January 30, 1928, with its principal office in New York City. Pursuant to its certificate of incorporation, it issued 1,000 shares of its capital stock of the par value of $100 each.

3. N. Y. Rayon Importing Co., Inc. (hereinafter called "Rayon #2"), one of the plaintiffs in Docket No. 45861, is a dissolved New

York corporation. It was duly incorporated under the laws of the State of New York on March 1, 1930, with its principal office in New York City, in order to acquire all the assets and to assume all the liabilities of four other corporations, Rayon #1, Nyrayco, Rayseta Yarns Corp., and Rayonese Yarns Corp., pursuant to a plan of reorganization.

4. From the respective dates of their incorporation and up to and including March 1, 1930, Rayon #1 and Nyrayco were engaged in the business of importing and selling rayon yarn. As the rayon was imported, entries were made in their behalf in the Customs House and the entries were liquidated by the Collector of Customs. During the years 1925, 1926, and 1927, Rayon #1, and during the years 1928 and 1929, Rayon #1 and Nyrayco paid large sums of money for customs duties which had been assessed on
21 shipments of rayon yarn imported by them, against which assessments, claimed by Rayon #1 and Nyrayco to be erroneous and illegal, protests were duly filed prior to March 1, 1930, with the Collector of Customs by and on behalf of those corporations under Section 514 of the Tariff Act of 1922, thereby instituting actions in the United States Customs Court. All of the protests were filed either by Rayon #1 or Nyrayco or on behalf of Rayon #1 by Richard Shipping Corporation, its customs house broker.

5. On or about March 1, 1930, an agreement was entered into between the owners of all of the issued and outstanding stock of Rayon #1, Nyrayco and of two other corporations known as Rayseta Yarns Corp. (hereinafter called "Rayseta"), and Rayonese Yarns Corp. (hereinafter called "Rayonese"), to effect a reorganization of those corporations by which all of the assets, liabilities, and business of the four corporations would be transferred to and united into one corporation and the business conducted as a single corporate entity. Rayon #2 was incorporated for this purpose on March 1, 1930, as shown in finding 3. Pursuant to resolutions adopted at a meeting of the Board of Directors of Rayon #2 held on or about March 1, 1930, Rayon #2 offered to acquire from Rayon #1, Nyrayco, Rayseta, and Rayonese all of the assets of those corporations and to assume all of the liabilities of those corporations in consideration of the issuance by Rayon #2 to those corporations, or their nominees, of all of the shares of its capital stock then outstanding. Meetings of the Boards of Directors of Rayon #1, Nyrayco, Rayseta, and Rayonese were held on or about March 1, 1930, and resolutions were unanimously adopted accepting the offer and transferring to Rayon #2 all of the assets of those corporations.

6. The pertinent portion of the resolution adopted by the Board of Directors of Rayon #1 on March 1, 1930, as reflected

in the minutes of a special meeting thereof, which were signed on that date, reads as follows:

"Whereas an offer has been made to this corporation by N. Y. Rayon Importing Co. Inc. (organized March 1, 1930), providing for the assignment by this corporation of all of its assets including its name and good-will, all as of March 1, 1930, in exchange for the issuance of 500 shares of the capital stock of the said corporation to be issued to this corporation or its nominees, and in further consideration of the assumption of all the liabilities of this Company; * * *

"Now, therefore, be it

"Resolved that the said offer be and the same is in all respects accepted and that each and every officer of this Company be and the same is hereby authorized and directed to take any and all action and to execute any and all documents necessary or desirable in order to carry out the terms and provisions of this agreement by this Company to be performed."

The pertinent portion of the resolution adopted by the Board of Directors of Nyrayco on March 1, 1930, as reflected in the minutes of a special meeting thereof, which were signed on that date, reads as follows:

"Whereas, an offer has been made to this Corporation by N. Y. Rayon Importing Co. Inc. (organized March 1, 1930) providing for the assignment by this Corporation of all its assets as of March 1, 1930, in exchange for the issuance of 1,000 shares of the capital stock to this Corporation or its nominees and in further consideration of the assumption of all the liabilities of this Company; * * *

"Now, therefore, be it

"Resolved that the said Offer be, and the same is in all respects accepted and that each and every officer of this Company be, and the same is hereby authorized and directed to take any and all action and to execute any and all documents necessary or desirable in order to carry out the terms and provisions of this agreement by this Company to be performed."

Similar resolutions were adopted by the Boards of Directors of Rayseta and Rayonese at special meetings thereof for the transfer of all the assets of those corporations to Rayon #2 in consideration of the issuance of 150 shares of its capital stock to Rayseta or its nominees, and in consideration of the issuance of 150 shares of its capital stock to Rayonese or its nominees.

The offers made by Rayon #2, referred to in the above resolutions of the Board of Directors of Rayon #1 and Nyrayco, read as follows:

23 MARCH 1ST, 1930.

N. Y. RAYON IMPORTING CO., INC.,
New York, N. Y.

DEAR SIRS: In consideration of the transfer of all the assets of this Company to the undersigned corporation including the name and good-will of the Company as of March 1st, 1930, we agree to issue to you or your nominees 500 shares of the capital stock of this Company and further agree to assume all of the liabilities of your Company.

Very truly yours,
N. Y. RAYON IMPORTING CO., INC. (1930).

MARCH 1, 1930.

NYRAYCO IMPORTING & CONVERTING CORPORATION,
New York, N. Y.

DEAR SIRS: In consideration of the transfer of all the assets of this Company to the undersigned corporation, as of March 1, 1930, we agree to issue to you or your nominees, 1,000 shares of the capital stock of this Company, and further agree to assume all of the liabilities of your Company.

Very truly yours,
N. Y. RAYON IMPORTING CO., INC. (1930).

Similar offers were made by Rayon #2 addressed to Rayseta and Rayonese.

The pertinent portions of the minutes of the special meeting of the Board of Directors of Rayon #2 held on or about March 1, 1930, which were signed at the time of that meeting, read as follows:

"The Secretary announced that the company was in receipt of an offer from the old N. Y. RAYON IMPORTING CO., INC., offering to sell to this Company all of its assets including therein its name and good-will, as of March 1, 1930, which said offer together with the schedule of the assets and liabilities was ordered to be filed with the minutes of this meeting, in consideration of the assumption by this company of all its liabilities and the issuance to the said company or its nominees of 500 shares of the capital stock of this company. After due consideration and upon motion duly made and seconded, the following preamble and resolutions were unanimously adopted:

"'Whereas in the opinion of this Board of Directors, the said offer is for the best interests of this company.

24 "'Now, therefore, be it

"'Resolved that the said offer be and the same is hereby accepted and that this company purchase all of the assets and

assume all of the liabilities of the said company as more particularly set forth in the offer annexed to the minutes of this meeting, in consideration of the issuance by this company of 500 shares of its capital stock, and be it

"'Further resolved, that each and every officer of this company be and the same is hereby authorized and directed to take any and all action and to execute any and all documents necessary or advisable in order to carry out the terms and provisions of the said agreement on the part of this company to be performed.'

"The Secretary announced that the company was in receipt of an offer from the Nyrayco Importing & Converting Corporation, offering to sell to this company all of its assets as of March 1, 1930, which said offer together with the schedule of the assets and liabilities was ordered to be filed with the minutes of this meeting, in consideration of the assumption by this company of all its liabilities and the issuance to the said company or its nominees of 1,000 shares of the capital stock of this company. After due consideration and upon motion duly made and seconded, the following preamble and resolutions were unanimously adopted:

"'Whereas in the opinion of this Board of Directors, the said offer is for the best interests of this company,

"'Now, therefore, be it

"'Resolved, that the said offer be and the same is hereby accepted and that this company purchase all of the assets and assume all of the liabilities of the said company as more particularly set forth in the offer annexed to the minutes of this meeting, in consideration of the issuance by this company of 1,000 shares of its capital stock, and be it

"'Further resolved that each and every officer of this company be and the same is hereby authorized and directed to take any and all action and to execute any and all documents necessary or advisable in order to carry out the terms and provisions of the said agreement on the part of this company to be performed.'"

Similar resolutions were adopted concerning the transfer of the assets of Rayseta and Rayonese.

The offers made by Rayon #1 and Nyrayco, referred to in the above resolutions of the Board of Directors of Rayon #2, read as follows:

25 MARCH 4, 1930.

N. Y. RAYON IMPORTING CO. INC.,

New York City.

GENTLEMEN: We hereby offer to sell to you all of our assets, including therein the name and good-will of our company, as of March 1, 1930, in consideration of the assumption by you of all

the liabilities of this company and the issuance to this company or its nominees of 500 shares of the capital stock of your company full paid and nonassessable. A schedule of the assets and liabilities of this company is attached hereto and made part of this offer.

Yours very truly,

N. Y. RAYON IMPORTING CO., INC.

MARCH 4, 1930.

N. Y. RAYON IMPORTING CO. INC.,
New York City.

GENTLEMEN: We hereby offer to sell to you all of the assets of our company, as of March 1, 1930, in consideration of the assumption by you of all the liabilities of this company and the issuance of this company or its nominees of 1,000 shares of the capital stock of your company full paid and nonassessable. A schedule of the assets and liabilities of this company is attached hereto and made part of this offer.

Yours very truly,

NYRAYCO IMPORTING & CONVERTING CORPORATION.

Although these two offers refer to a schedule of assets and liabilities, no schedules of assets and liabilities were ever submitted with or attached to the offers.

Attached to the minutes of the special meetings of the Boards of Directors of Rayon #1 and Nyrayco, held on March 1, 1930, were written consents of the stockholders of record of Rayon #1 and Nyrayco to the transfer of all the assets of these corporations to Rayon #2. These consents were not signed at the time of the reorganization, but were signed some years later.

7. Between the months of March and June 1930, inclusive, all of the issued and outstanding shares of stock of Rayon #1, Nyrayco, Rayseta, and Rayonese (a total of 1,800 shares of the par value of $100 each) were delivered to Rayon #2, and Rayon
26 #2 took over the business and all of the assets of the four predecessor corporations, in consideration of the assumption by Rayon #2 of all of the liabilities of the four predecessor corporations and the issuance by it to the nominees of the four predecessor corporations of 1,800 shares of its capital stock of the par value of $100 each, being all of the shares of its capital stock then outstanding. At the time of the transfer of all of the assets of Rayon #1 and Nyrayco as set out above, one of the assets of each of those corporations was their refund claims then pending undetermined, for refund of excessive custom duties paid.

8. As part of the reorganization, Rayon #1 was dissolved and in connection therewith Max Spinnler, president and a director of Rayon #1, verified an Application dated February 27, 1930,

for Consent to Dissolution of Rayon #1, which was submitted to the New York State Department of Taxation and Finance. This application stated that March 1, 1930, was the date of discontinuance of business, that all of the assets of the corporation had been disposed of, and that N. Y. Rayon Importing Co., Inc. (newly organized) acquired the assets of Rayon #1 and would continue the business formerly conducted by Rayon #1.

9. On October 30, 1930, Max Spinnler who was the president and a director of Rayon #1, Nyrayco, Rayseta, Rayonese, and Rayon #2, wrote a memorandum reading as follows:

"The old companies, N. Y. Rayon Importing Co., Nyrayco Imp. & Converting Co., are united Assets and Liabilities together with Rayonese Yarns Corp., Rayseta Yarns Corp. into a new company, N. Y. Rayon Imp. Co., with a capital of $180,000:

NYRIC	$50,000
Nyrayco	100,000
Rayonese	15,000
Rayseta	15,000
	180,000

"Nyric" was an abbreviation of N. Y. Rayon Importing Co., Inc.

10. Prior to the above reorganization, a French corporation known as Comptoir des Textiles Artificiel was the equitable owner of all the 1,800 outstanding shares of stock of Rayon #1, Nyrayco, Rayseta, and Rayonese. As part of the reorganization,
27 all of those shares of stock were transferred and delivered to Rayon #2, and Rayon #2 became the legal owner and holder of all the shares of stock of the four predecessor corporations. Rayon #2, in turn, issued 1,800 shares of its capital stock (the only shares ever issued by it) all of which were delivered to the legal owner thereof, the impleaded plaintiff, Societe Pour Nouveaux Placements de Capitaux (hereinafter called "Societe"), a Swiss corporation, the beneficial interest in which corporation is held by Comptoir des Textiles Artificiel.

11. Rayon #1 was duly dissolved on March 1, 1930, by the filing of a voluntary Certificate of Dissolution on that date with the Secretary of State of the State of New York in compliance with Section 105 of the New York Stock Corporation Law, and on March 1, 1930, a Certificate of Dissolution was issued by the Secretary of State of the State of New York.

12. Rayon #2 was duly dissolved on January 9, 1931, by the filing of a voluntary Certificate of Dissolution on that date with the Secretary of State of the State of New York in compliance with Section 105 of the New York Stock Corporation Law, and on

January 9, 1931, a Certificate of Dissolution was issued by the Secretary of State of the State of New York.

13. Nyrayco was dissolved on December 16, 1935, under Section 203-a of the New York Tax Law, by proclamation for nonpayment of franchise taxes.

14. The protests filed by and on behalf of Rayon #1 and Nyrayco, as shown in finding 4, prior to the reorganization in March 1930, came on for hearing and decision by the United States Customs Court. On April 30, 1937, and May 6, 1937, respectively, the United States Customs Court rendered two decisions and judgments in favor of Rayon #1 and Nyrayco on the protests, sustaining the claims filed by and on behalf of Rayon #1 and Nyrayco and directing a reliquidation accordingly of the customs entries covering the shipments of rayon yarns.

15. The fact of the dissolution of Nyrayco on December 16, 1935, for nonpayment of its franchise taxes was never in any way brought to the attention of the United States Customs Court in connection with the proceedings then pending therein by Nyrayco.

28 16. Upon the entry of the above judgments by the United States Customs Court, the Collector of Customs of the Port of New York reliquidated the entries listed in the schedules appended to those decisions and judgments, computing with respect to each entry the amount of assessed duties which should be refunded thereon under those decisions and judgments. The refunds were duly certified by the Collector of Customs to the proper disbursing officer for payment; and as a result of the reliquidation, the total amount of the refunds payable under the judgments upon importation of merchandise by Rayon #1 and Nyrayco was $362,482.71 and $30,809.75, respectively. The checks itemized in the exhibits made part of the petitions in this court in these three actions (which exhibits are made a part hereof by reference), covering the refunds and aggregating the total of $393,292.46, were drawn by G. F. Allen, Chief Disbursing Officer of the United States, on the Treasurer of the United States, on various dates from August 4, 1937, to February 3, 1938, payable respectively to Rayon #1, Nyrayco, and Richard Shipping Corporation, the latter being the customs house broker of Rayon #1.

The aggregate of the checks made payable to Rayon #1 was $359,548.96; that made payable to Nyrayco was $30,809.75, and the one check made payable to Richard Shipping Corporation was in the amount of $2,933.75. Richard Shipping Corporation filed a formal acknowledgment on the trial of these actions stating that the protest, as a result of which the check for $2,933.75 was drawn, was filed by it as customs house broker acting on behalf of Rayon #1 and that Richard Shipping Corporation had no interest in

the check or the proceeds thereof, but that the check and its proceeds belonged either to Rayon #1 or its successor in interest.

17. Appropriations for the refund or payment of customs collections or receipts for the fiscal year ending June 30, 1938, were duly made by Congress by the Act of May 14, 1937 (50 Stat. 137, 142), and the Act of June 25, 1938 (52 Stat. 1114, 1149).

18. Because of the fact that the checks were payable to Rayon #1 and Nyrayco which were dissolved corporations and the check in the amount of $2,933.75 payable to the order of Richard
29 Shipping Corporation belonged to Rayon #1, or its successor in interest, the Collector of Customs caused the checks to be transmitted to the General Accounting Office in Washington, D. C., for lawful disposition.

19. A petition was filed by Rayon #2 with the General Accounting Office requesting the transfer to it of the checks, but the General Accounting Office refused to deliver the checks to Rayon #2, Rayon #1, or Nyrayco. The proceeds of the checks were deposited in the Treasury in a trust fund entitled "outstanding Liabilities 1938," pursuant to Section 725 (t), Title 31, of the United States Code, and are credited and still remain credited in that account to the following parties in the amounts hereinafter set forth:

N. Y. Rayon Importing Co., Inc. (which is Rayon #1)	$359,548.96
Richard Shipping Corporation	2,933.75
Nyrayco Importing & Converting Corporation (which is Nyrayco)	30,809.75

20. In June 1940, an action was instituted in the Supreme Court of the State of New York for a declaratory judgment to adjudicate, among other things, the ownership of the customs refund claims as between Rayon #1 and Nyrayco on the one hand, and Rayon #2 on the other, and on January 24, 1942, a consent judgment was entered in that court adjudicating that "as between those corporations" Rayon #2 was the owner of these customs refunds or the proceeds thereof. On or about January 30, 1942, a copy of that judgment was sent to the General Accounting Office accompanied by a written demand by Rayon #2 for payment of the proceeds of the checks aggregating $393,292.46, but the General Accounting Office still refused to approve the payment thereof.

Thereafter, on February 26, 1943, the attorneys for Rayon #1, Nyrayco, and Rayon #2 wrote to the Comptroller General of the United States as follows:

"Should it suit your purposes better, in the alternative the funds could, with the consent of N. Y. Rayon Importing Co., Inc. (#2) (hereinafter called 'Rayon #2'), now to be released to N. Y. Rayon Importing Co., Inc. (#1) (hereinafter called 'Rayon #1') and Nyrayco Importing & Converting Corporation (hereinafter

called 'Nyrayco'), each corporation being represented by its director or directors, as trustees in liquidation."

30 The Comptroller General nevertheless refused to allow payment of any claim based upon these judgments for customs, refunds, or the proceeds of the checks issued therefor, unless and until a final judgment by a court of competent jurisdiction concluded the question as to which of the claimants has a valid right to the amounts thereof, and he suggested that suit be brought in the Court of Claims. The date of the final refusal of the Comptroller General was March 25, 1943.

21. At the time of the dissolution of Rayon #1, its directors were Charles A. Springstead, one of the plaintiffs in Docket No. 45862, one Austin E. Kilkenny and one Max Spinnler. Austin E. Kilkenny died on July 20, 1932, and Max Spinnler died on April 1, 1935, so that from April 1, 1935, Charles A. Springstead was and is the sole surviving director of the directors in office at the time of the dissolution of Rayon #1.

22. Article II, Sections 2 and 9, of the By-Laws of Rayon #1, provides as follows:

"SECTION 2. Vacancies.—In case of any vacancy in the Board of Directors through death, resignation, disqualification or other cause, the remaining directors, although less than a quorum, by affirmative vote of a majority thereof may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant and until the election of his successor.

"SECTION 9. Quorum.—At least two (2) of the directors in office shall constitute a quorum for the transaction of business but if at any meeting of the Board there shall be less than a quorum present, the directors present may adjourn the meeting from time to time until a quorum is obtained."

23. At a meeting of the Board of Directors of Rayon #1, held on April 20, 1938, Charles A. Springstead, as the sole surviving director, elected Alfred L. Rose, one of the plaintiffs in Docket No. 45862, as a director of Rayon #1 to fill the vacancy caused by the death of Austin E. Kilkenny. Alfred L. Rose thereupon entered the meeting and took his place as a director, and, together with Charles A. Springstead, elected Norman S. Goetz, one of the plaintiffs in Docket No. 45862, as a director of Rayon #1 to fill the vacancy caused by the death of Max Spinnler.

31 To the knowledge of plaintiff, Alfred L. Rose, no other persons have been elected as directors of Rayon #1 since April 20, 1938, and no evidence has been presented that any other persons have been elected as directors of that corporation since that time. Plaintiffs Charles A. Springstead, Alfred L. Rose, and Norman S. Goetz since that date have continued to hold the

offices to which so elected. They are all residents of the State of New York and citizens of the United States, and in Docket No. 45862, Charles A. Springstead, Alfred L. Rose, and Norman S. Goetz sue in their representative capacities as the liquidating directors and trustees of Rayon #1.

24. At the time of the dissolution of Nyrayco, its directors were Max Spinnler, Martin Lowenberg, and Samuel W. Lowenberg. Martin Lowenberg resigned as a director on January 22, 1942, and Max Spinnler died, as heretofore shown, on April 1, 1935. From January 22, 1942, Samuel W. Lowenberg was and is the sole surviving director of the directors in office at the time of the dissolution of Nyrayco.

25. At a meeting of the Board of Directors of Nyrayco held on January 22, 1942, Samuel W. Lowenberg, as the sole surviving director, elected Alfred L. Rose as a director of Nyrayco to fill the vacancy caused by the death of Max Spinnler, and Norman S. Goetz as a director of Nyrayco to fill the vacancy caused by the resignation of Martin Lowenberg.

To the knowledge of plaintiff, Alfred L. Rose, no other persons have been elected as directors of Nyrayco since January 22, 1942, and no evidence has been presented that any other persons have been elected as directors of that corporation since that time. Samuel W. Lowenberg, Alfred L. Rose, and Norman S. Goetz since that date have continued to hold the offices to which so elected.

26. At the time of the dissolution of Rayon #2, its directors were Alfred L. Rose, one of the plaintiffs in Docket No. 45861, one Max Spinnler, and one Hartley Robbins; and there was one vacancy in the membership of the Board of Directors by reason of the death of Heinrich Keller, also known as Heinrich Keller-Gull. Heinrich Keller, also known as Heinrich Keller-Gull,
32 died on December 9, 1930; Max Spinnler died on April 1, 1935, and Hartley Robbins died on May 25, 1938; so that from May 25, 1938, Alfred L. Rose was and is the sole surviving director of the directors in office at the time of the dissolution of Rayon #2.

27. The provisions of Article II, Sections 2 and 9, of the By-Laws of Rayon #2, are the same as the provisions of Article II, Sections 2 and 9, of the By-Laws of Rayon #1, previously set forth in finding 22.

28. At a meeting of the Board of Directors of Rayon #2, held on June 10, 1938, Alfred L. Rose, as the sole surviving director, elected Norman S. Goetz, one of the plaintiffs in Docket No. 45861, as a director of Rayon #2 to fill the vacancy caused by the death of Max Spinnler. Norman S. Goetz thereupon entered the meeting and took his place as a director; and, together with Alfred L.

Rose, elected Walter Mendelsohn, one of the plaintiffs in Docket No. 45861, as a director of Rayon #2 to fill the vacancy caused by the death of Heinrich Keller, also known as Heinrich Keller-Gull. Walter Mendelsohn thereupon entered the meeting and took his place as a director; and, together with Alfred L. Rose and Norman S. Goetz, elected Bernard D. Lang, one of the plaintiffs in Docket No. 45861, as a director of Rayon #2 to fill the vacancy caused by the death of Hartley Robbins.

To the knowledge of plaintiff, Alfred L. Rose, no other persons have been elected as directors of Rayon #2 since June 10, 1938, and no evidence has been presented that any other persons have been elected as directors of that corporation since that time. Plaintiffs Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn, and Bernard D. Lang since that date have continued to hold the offices to which so elected. They are all residents of the State of New York and citizens of the United States, and in Docket No. 45861 Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn, and Bernard D. Lang sue in their representative capacities as the liquidating directors and trustees of Rayon #2.

29. The petitions in these suits were filed on April 29, 1943. On June 9, 1943, an order was entered consolidating these suits for the purpose of hearing and reporting by the Commissioner. Thereafter, on motion of the United States and pursuant to order of this court dated December 8, 1943, Societe was added as a party
33 plaintiff in each of these suits by the filing of amended petitions on January 21, 1944, so that it might be bound by the judgments of this court.

30. On motion of defendant, on November 25, 1944, and January 9, 1945, this court entered orders that (1) Cpl. Jean Pierre (John) Spinnler, Westover Field, Massachusetts; (2) Martin Lowenberg, 782 Pelham Parkway, South, Bronx, New York City; (3) Samuel W. Lowenberg, 305 Broadway, New York City, individually and as attorney in fact for Justine M. Spinnler and Cpl. Jean Pierre (John) Spinnler; and (4) Richard Shipping Corporation, 60 Beaver Street, New York City, appear before the Court within the time specified in those orders to assert and defend any possible interest each of them might have in these suits by filing an intervening petition conforming to the rules of this court, and that upon failure so to appear, any claims by these persons against defendant in respect to the subject matter of these suits should be forever barred. On December 4, 1944, the applicable order, together with a copy of the amended petitions in these cases, was personally served upon Martin Lowenberg, Samuel W. Lowenberg, and Richard Shipping Corporation by a Deputy United States Marshal. On December 8, 1944, the applicable order, together with a copy of the amended petitions in these cases, was

personally served upon Cpl. Jean Pierre (John) Spinnler by a Deputy United States Marshal. None of said persons has filed an intervening petition in these suits pursuant to these orders.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs, N. Y. Rayon Importing Co., Inc. (Rayon #2) and Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn and Bernard D. Lang, as Liquidating Directors and Trustees, are entitled to recover $393,292.46, with interest at six percent from April 19, 1941; and that none of the other parties to either of the consolidated suits is entitled to recover.

It is therefore adjudged and ordered that plaintiffs N. Y. Rayon Importing Co., Inc. (Rayon #2) and Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn and Bernard D.
34 Lang, as Liquidating Directors and Trustees, recover of and from the United States three hundred ninety-three thousand two hundred ninety-two dollars and forty-six cents ($393,292.46) with interest at six percent from April 19, 1941.

It is further adjudged and ordered that as to plaintiffs N. Y. Rayon Importing Co., Inc. (Rayon #1) and Alfred L. Rose, Norman S. Goetz and Charles A. Springstead, as Liquidating Directors and Trustees of N. Y. Rayon Importing Co., Inc. (Rayon #1), Nyraco Importing & Converting Corporation, impleaded plaintiff Societe Pour Nouveaux Placements de Capitaux, and as to Cpl. Jean Pierre (John) Spinnler, Martin Lowenberg, Samuel W. Lowenberg, individually and as attorney in fact for Justine M. Spinnler and Cpl. Jean Pierre (John) Spinnler and Richard Shipping Corporation, the petitions and all claims of interest in each of the consolidated suits be and the same are dismissed.

Opinion

JONES, Judge, delivered the opinion of the court:

These three suits are brought on two judgments rendered in 1937 by the United States Customs Court for the recovery of excessive duties paid by importers of rayon yarn. The duties were collected during the years 1925–1929. The calculations pursuant to judgments showed the excess collections totaled $393,292.46.

Three checks were drawn in payment of these judgments, but the General Accounting Office refused payment on the ground that the payee corporations had been dissolved. The proceeds of the checks were deposited in the Treasury in a trust fund entitled "Outstanding Liabilities 1938," pursuant to Section 725 (t), Title

31, of the United States Code, and were credited and still remain credited in that account to the following parties in the amounts hereinafter set forth:

N. Y. Rayon Importing Co. Inc. (which is Rayon #1)	$359,548.96
Richard Shipping Corporation	2,933.75
Nyraco Importing & Converting Corporation (which is Nyraco)	30,809.75

The defendant concedes the overpayment of duties but raises the question as to which of the plaintiffs is entitled to the money and whether interest should be paid on the amount of the judgments. Several incidental issues are involved.

The issues are somewhat confused by the dissolution and reorganization of corporations, stock transfers and board meetings, as well as the numerous parties to the various transactions. However, in going through the record, certain essential facts emerge that are helpful in our efforts to arrive at a correct conclusion.

The N. Y. Rayon Importing Co., Inc., called "Rayon #1," and Nyraco Importing and Converting Corporation, called "Nyraco," prior to March 1, 1930, protested customs duties on imported rayon yarns as excessive and illegal. All the protests were filed prior to March 4, 1930, by these two companies or by Richard Shipping Corporation, the customs house broker of Rayon #1. This is the prescribed method of instituting actions in the United States Customs Court.

On or about March 1, 1930, meetings of the Boards of Directors of Rayon #1, Nyraco and two other corporations called "Rayseta" and "Rayonese" unanimously adopted resolutions transfering all the assets and holdings of the four corporations to N. Y. Rayon Importing Co., Inc., called "Rayon #2," which was organized about that time for that purpose, which latter company agreed to assume the liabilities of the four corporations.

As a part of the reorganization Rayon #1 was dissolved as of March 1, 1930.

Rayon #2 was dissolved January 9, 1931.

Nyraco was dissolved December 16, 1935, because of delinquency in payment of taxes.

After the judgments by the United States Customs Court, dated April 30, 1937, and May 6, 1937, based on the protests of Rayon #1 and Nyraco, refunds were duly certified by the Collector of Customs to the proper disbursing officer for payment, $359,548.96 to Rayon #1, $2,933.75 to its customs house broker, Richard Shipping Corporation, and $30,809.75 to Nyraco.

After the General Accounting Office refused payment of the checks a petition was filed by Rayon #2 with that office requesting the transfer to it of the checks, which was refused.

In June 1940 an action was instituted in the Supreme Court of the State of New York for a declaratory judgment
36 to adjudicate the ownership of the customs refund claims as between Rayon #1 and Nyraco on the one hand and Rayon #2 on the other. On January 30, 1942, a consent judgment was entered in that court adjudicating that as between such companies Rayon #2 was the owner of the customs refunds or the proceeds thereof. The General Acounting Office still refused payment.

On February 26, 1943, attorneys for the three companies offered, in the alternative if the Comptroller General so desired, to have Rayon #2 release the funds to Rayon #1 and Nyraco, and for this purpose to have each of such corporations represented by the director or directors as trustees in liquidation. This effort proved fruitless.

The Comptroller General refused to allow payment of any claim based upon the judgment for customs, refunds, or the proceeds of the checks issued therefor, unless and until a court determined which of the various claimants had a right to the several amounts and suggested that suit be brought in the Court of Claims of the United States.

Accordingly these suits were filed.

The defendant impleaded other companies and individuals to defend any possible interest which they or any of them might have so that the question of ownership could be determined and all such parties bound. These will be discussed later in the opinion.

The details are set out in the findings and will not be repeated here.

In the circumstances we think there is no doubt of the right of the successor to Rayon #1 and its liquidating directors to recover $362,482.71. The defendant makes little contest of this item.

On the item of $30,809.75, the defendant contends that the judgment of the Customs Court was void because Nyraco, as a dissolved corporation, had no right to maintain the suit in the Customs Court.

The fact of the dissolution of Nyraco was never brought to the attention of the Customs Court during the pendency of the proceedings before it.

In 1932 section 29 of the General Corporation Law of New York was amended to include the following language:

"Upon the dissolution of a corporation for any cause and whether voluntary or involuntary its corporate ex-
37 istence shall continue for the purpose of * * * collecting and disbursing its assets * * * and it may sue and be sued in its corporate name."

At the time of the institution of the proceedings in the Customs Court another provision of the New York statute, Section 203–a of the New York Tax Law, was in effect. It provided for automatic dissolution of corporations listed by the Secretary of State as delinquent in the payment of taxes.

On April 9, 1931, subdivision 10 was added to Section 203–a, reading as follows:

"Notwithstanding any provision of this section, a corporation so dissolved pursuant hereto may thereafter in actions to foreclose tax liens be sued in its corporate name, adding thereto the words 'a corporation dissolved pursuant to section two hundred and three–a of the tax law of the state of New York' and personal service of the summons, complaint or other papers upon said dissolved corporation may be made by service of the same upon any person, who at the time of said dissolution was an officer, director, or trustee of said corporation, and a judgment obtained against said dissolved corporation shall be binding upon all of its property and assets to the same extent as if such corporation were not dissolved. Actions begun against any such corporation previous to its dissolution may thereafter proceed without change in the name of said corporation and the judgments when obtained shall be binding upon all of the property and assets of such dissolved corporation to the same extent as if such corporation had not been dissolved. Judgments heretofore obtained against any such corporation sued in its corporate name, shall be conclusive upon the legal representatives, stockholders, property and assets of said dissolved corporation to the same extent as if said corporation had not been dissolved anything to the contrary herein stated notwithstanding, unless an action to vacate the same shall have been commenced within six months after the passage of this act."

Defendant contends that this provision is inconsistent with the provision of Section 29 of the General Corporation Law, and that since Section 6 stipulates that in the event of inconsistency the provisions of the General Corporation Law shall not apply, Nyrayco had no right to maintain its suit in the Customs Court after its dissolution in 1935 for nonpayment of taxes.

38 The Supreme Court of New York in the case of Interstate Trucking Co. v. Manufacturers Trust Co., N. Y. L. J., May 2, 1935, 2260, held that Section 29 of the General Corporation Law applied to corporations dissolved under the tax law. The issues in the case arose prior to the enactment of subdivision 10, but the court in commenting used the following language:

"No provision to the contrary was to be found in Section 203–a of the Tax Law or elsewhere. Even if it be assumed that subdivision 10, after its enactment in 1931, applied to corporations which had previously been dissolved, there is nothing in that subdivision

to negative the right of the directors to maintain a suit in the corporate name. Subdivision 10 deals only with suits against the corporation. It is silent with respect to suits by the corporation. The right to sue should not be forfeited by implication."

To the same effect was the decision in Douglas v. Perlstein, 170 Misc. 561, 10 N. Y. Supp. (2d) 479.

In 1937 the Customs Court held contrary to the defendant's position on the exact question in Klytia Corp. v. United States, 72 T. D. 1124.

In 1939, however, the Appellate Division in Application of S. M. & J. Eisenstadt, Inc., 256 App. Div. 488, 10 N. Y. Supp. (2d) 868, held that corporations dissolved for nonpayment of taxes are legally dead and had no legal authority to sue.

The legislature in 1940 amended the law by specifically providing that Section 29 of the General Corporation Law should apply to corporations dissolved under the tax law (N. Y. Laws, 1940, C. 82). This amendment had been recommended by the Chief of the Division of Corporations on the ground that it was needed to clear up the uncertainty in the law.

There was still some disagreement as to whether the 1940 amendment applied to corporations previously dissolved. Then in 1941 the Legislature amended subdivision 10 of Section 203-a of the tax law, to include the following:

"The provisions of section twenty-nine of the general corporation law shall apply to any corporation heretofore or hereafter dissolved under this section."

This provision removed any doubt as to the right of any of the rayon corporations, or their liquidating directors, to maintain suits.

In the maze of reorganizations and transfers of assets and confusion we do not think it would be right or just to allow interest for the period prior to the enactment of the 1941 amendment. This amendment had the effect of removing any defects and uncertainty. It made clear the right of corporations dissolved under the tax law to maintain suits or be sued. By its terms it was made applicable to corporations theretofore dissolved. After April 19, 1941, the effective date of the amendment, there is no reason why Rayon #2, the owner of the two judgments, should not receive interest calculated from such date.

We can fully appreciate the desire of the General Accounting Office to protect the interests of the Government. This is as it should be. But the nation as well as the individual should be and usually is anxious to settle its just obligations. It has been known since 1937 that this money does not belong to the Government. In the confusion care was naturally exercised. But all the interested claimants seemed anxious to get the matter settled. Va-

rious offers were made which were rejected without any counter suggestion. These included offer of transfer or assignment and request for suggestions by liquidating directors and trustees. It was not until 1942 that suit in this court was suggested by the defendant.

It rather seems if officials of the General Accounting Office had been desirous of getting the matter disposed of they could have permitted transfers and assignments by all interested parties, or if this was not sufficient it could have suggested, at an earlier date, that an additional suit would be necessary. At any rate, four years seems a reasonably sufficient time to determine ownership of all parties. This is an added reason, at least persuasive, why the judgments of the Customs Court should bear interest after April 19, 1941, when all question of the capacity of plaintiffs to maintain suit was removed by the amendment to the New York law.

Societe Pour Nouveaux Placements de Capitaux, impleaded plaintiff in each of the consolidated suits, having filed disclaimer of interest, is not entitled to recover in either of them.

The following persons, Cpl. Jean Pierre (John) Spinnler, Martin Lowenberg, Samuel W. Lowenberg, individually and as attorney in fact for Justine M. Spinnler and Cpl. Jean Pierre (John) Spinnler and Richard Shipping Corporation, having been duly cited, by order of the court on motion of the defendant, to appear before the court within the time specified in the orders to assert and defend any possible interest any of them might have in these suits by filing intervening petitions, and each of them having failed to assert any claim or file any intervening petition, neither of them is entitled to recover and each of them is forever barred from asserting any claim in such suits, the subject matter or the proceeds thereof.

N. Y. Rayon Importing Co., Inc. (Rayon #2) and Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn, and Bernard D. Lang, as its Liquidating Directors and Trustees, by authorized transfer, assignment and succession, are the present owners of the two judgments, proceeds, subject matter and checks, entered and issued as heretofore described, and as such are entitled to recover from the defendant the sum of $393,292.46, together with interest from April 19, 1941, at the rate of six percent per annum, being the proceeds in the three consolidated suits.

By reason of the transfer, assignment and succession above referred to, the plaintiffs in suit No. 43862, N. Y. Rayon Importing Co. Inc. (#1) and Alfred L. Rose, Norman S. Goetz, and Charles A. Springstead, as Liquidating Directors and Trustees of N. Y. Rayon Importing Co. Inc. (#1), and in suit No.

41 45863 Nyrayco Importing & Converting Corporation, are not entitled to recover, their rights having been succeeded to by the plaintiffs named in the preceding paragraph.

It is so ordered.

WHITAKER, Judge; LITTLETON, Judge; and WHALEY, Chief Justice; concur.

MADDEN, Judge, took no part in the decision of this case.

43 *Judgment of the Court*

At a Court of Claims held in the City of Washington on the 4th day of February A. D., 1946, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs, N. Y. Rayon Importing Co., Inc. (Rayon #2) and Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn and Bernard D. Lang, as Liquidating Directors and Trustees are entitled to recover $393,292.46 with interest at six percent from April 19, 1941.

It is therefore adjudged and ordered, that plaintiffs, N. Y. Rayon Importing Co., Inc. (Rayon #2) and Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn and Bernard D. Lang, as Liquidating Directors and Trustees, recover of and from the United States three hundred ninety-three thousand two hundred ninety-two dollars and forty-six cents ($393,292.46) with interest at six per-

45 cent from April 19, 1941.

It is further adjudged and ordered, that as to impleaded plaintiff, Societe Pour Nouveaux Placements de Capitaux, and as to Cpl Jean Pierre (John) Spinnler, Martin Lowenberg, Samuel W. Lowenberg, individually and as attorney in fact for Justine M. Spinnler and Cpl Jean Pierre (John) Spinnler and Richard Shipping Corporation, the petitions and all claims of interest in each be and the same are dismissed.

47 [Clerk's certificate to foregoing transcript omitted in printing.]

(Endorsement on cover:) File No. 50,884, 50,888. Court of Claims. Term No. 1181. The United States, Petitioner, vs. N. Y. Rayon Importing Co., Inc. (#2) and Alfred L. Rose, Norman S. Goetz, et al. Enter Wilbur H. Friedman. Term No. 1185. N. Y. Rayon Importing Co., Inc. (#2) and Alfred L. Rose, Norman S. Goetz, et al., Petitioners vs. The United States. Petitions for writs of certiorari and exhibit thereto. Filed April 30, 1946, May 1, 1946. Term No. 1181 O. T. 1945, 1185 O. T. 1945.

Supreme Court of the United States

No. 94—October Term, 1946

Order allowing certiorari

Filed October 14, 1946

The petition herein for a writ of certiorari to the Court of Claims is granted, and the case is transferred to the summary docket and assigned for argument immediately following No. 106, United States vs. Thayer-West Point Hotel Co.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 96—October Term, 1946

Order allowing certiorari

Filed October 14, 1946

The petition herein for a writ of certiorari to the Court of Claims is granted, and the case is transferred to the summary docket and assigned for argument immediately following Nos. 106 and 94.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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No. [redacted] 94

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES, PETITIONER

v.

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, WALTER MENDELSOHN, AND BERNARD D. LANG AS LIQUIDATING DIRECTORS AND TRUSTEES OF N. Y. RAYON IMPORTING CO., INC. (#2)

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1181

UNITED STATES, PETITIONER

v.

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, WALTER MENDELSOHN, AND BERNARD D. LANG AS LIQUIDATING DIRECTORS AND TRUSTEES OF N. Y. RAYON IMPORTING CO., INC. (#2)

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above-entitled case on February 4, 1946.

OPINION BELOW

The opinion of the Court of Claims (R. 21–27) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on February 4, 1946 (R. 27). The juris-

diction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288 (b).

QUESTION PRESENTED

Whether the Court of Claims, in holding in favor of the claimants in one of three related suits brought to determine the ownership of a customs duty overpayment fund, can include in its judgment against the United States interest on the fund for a period prior to the entry of judgment, notwithstanding the provisions of Section 177 (a) of the Judicial Code.

STATUTE INVOLVED

The pertinent part of Section 177 (a) of the Judicial Code, 28 U. S. C. 284, provides:

> (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, * * *.

STATEMENT

The instant proceeding (Docket No. 45861 in the Court of Claims) was one of three related suits filed in the court below for the purpose of ascertaining the party or parties entitled to a fund which had been set up as an outstanding liability in the Treasury by direction of the General Accounting Office. Respondents herein

are N. Y. Rayon Importing Co., Inc. (#2)[1] and its "liquidating directors and trustees". In No. 45862, the plaintiffs were N. Y. Rayon Importing Co., Inc. (#1)[2] and its "liquidating directors and trustees". In No. 45863, the plaintiff was Nyrayco Importing & Converting Corporation.[3] The circumstances which raised the question of ownership of the customs duty overpayments and led to the establishment of the fund in the Treasury are as follows:

Rayon #1 was incorporated under New York law on April 26, 1923 (R. 9). Its original name was "N. Y. Artificial Silk Importing Co., Inc.", which name was changed to N. Y. Rayon Importing Co., Inc. by certificate filed on May 4, 1925 (R. 9). Nyrayco was incorporated under New York law on January 30, 1928 (R. 9). Both corporations were engaged in the importation of rayon yarn and, between 1925 and 1929, had paid customs duty assessments on such importations (R. 10). Both corporations claimed that the duties assessed were erroneous and illegal and, prior to March 1, 1930, had filed protests with the Collector of Customs in accordance with applicable tariff act provisions, which resulted in the institution of actions in the United States Customs Court (R. 10).

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[1] Hereinafter called Rayon #2.

[2] Hereinafter called Rayon #1.

[3] In all three cases, the Société Pour Nouveaux Placements de Capitaux was impleaded as plaintiff. The court below dismissed all claims of interest of this company (R. 27).

Rayon #2 was incorporated under New York law on March 1, 1930, for the purpose of acquiring all the assets and assuming all the liabilities of Rayon #1, Nyrayco, and two other corporations in the rayon business, Rayseta Yarns Corp. and Rayonese Yarns Corp. (R. 9–10). On that day, meetings of the boards of directors of these various corporations were held for the formal effectuation of this reorganization (R. 10). Pursuant to a resolution of its board of directors, Rayon #2 offered to acquire from Rayon #1, Nyrayco, Rayseta, and Rayonese the assets of those corporations and to assume their liabilities in consideration of the issuance by Rayon #2 to those corporations, or their nominees, of capital stock of Rayon #2 (R. 10). By resolutions of the respective boards of directors, this offer was accepted by Rayon #1, Nyrayco, Rayseta, and Rayonese, and all assets of the latter four corporations were transferred to Rayon #2 (R. 10).[4] Between March and June 1930, all issued and outstanding shares of stock in Rayon #1, Nyrayco, Rayseta, and Rayonese were de-

[4] The details of these corporate activities on March 1, 1930, are set out in the findings of the court below (R. 10–15). The findings as to the offer by Rayon #2 on March 1, 1930, and its acceptance by the four other corporations on that date (R. 10–12) are duplicated by findings of offers, apparently cross-offers, made by Rayon #1 and Nyrayco to Rayon #2 on March 4, 1930, four days later (R. 13–14). The court below referred to these offers of March 4, as offers which had been accepted by Rayon #2 at a meeting of its board of directors

livered to Rayon #2, which took over the business and all assets of the four transferring corporations and, in turn, issued to their nominee 1,800 shares of capital stock (R. 14).[5]

On February 27, 1930, a few days prior to the reorganization date mentioned above, Rayon #1 filed a verified application with the New York State Department of Taxation and Finance for its dissolution (R. 14–15). The application stated that March 1, 1930, was the date of discontinuance of business, that all of the assets of Rayon #1 had been disposed of, and that Rayon #2 acquired the assets of Rayon #1 and would continue the business formerly conducted by Rayon #1 (R. 15). On March 1, 1930, a Certificate of

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on March 1, 1930 (R. 12–13). The offers made by Rayon #1 and Nyrayco on March 4, 1930 each refer to an attached schedule of corporate assets and liabilities; no such schedules were ever submitted with or attached to the offers (R. 14). Written consents of the stockholders of record of Rayon #1 and Nyrayco to the transfer of all assets of these corporations to Rayon #2 were not signed until some years after the reorganization, by which time at least two of the corporations (Rayon #1 and Rayon #2) had been voluntarily dissolved (R. 14).

[5] Prior to the reorganization discussed above, a French corporation known as Comptoir des Textiles Artificiel was equitable owner of all outstanding shares of stock of Rayon #1, Nyrayco, Rayseta and Rayonese (R. 15). Rayon #2 became the legal owner and holder of such shares of stock pursuant to the reorganization and, in turn, issued all of its capital stock to the Societe Pour Nouveaux Placements de Capitaux, a Swiss corporation controlled by the above-mentioned French corporation (R. 15).

Dissolution was issued by the New York Secretary of State (R. 15).

Rayon #2 was voluntarily dissolved on January 9, 1931, by the filing of a certificate in compliance with the New York law, and the issuance of a Certificate of Dissolution by the New York Secretary of State (R. 15–16). Nyrayco was dissolved on December 16, 1935 by proclamation, under Section 203–a of the New York Tax Law, for nonpayment of franchise taxes (R. 16).

Sometime after the above-described reorganization and the dissolution of all three corporations, the United States Customs Court rendered decisions sustaining the protests which had been filed by Rayon #1 and Nyrayco in connection with the assessment of duties on rayon yarn imported between 1925 and 1929 (R. 16). The decisions were rendered on April 30, 1937, and May 6, 1937, and a reliquidation of the customs entries was directed (R. 16). On reliquidation, the Collector of Customs ascertained that a refund of $362,482.71 was payable on the protests of Rayon #1 and $30,809.75 on the Nyrayco protests (R. 16). After due certification for payment by the Collector of Customs to the appropriate disbursing official, checks were drawn by the Chief Disbursing Officer of the United States, payable respectively to Rayon #1 and Nyrayco (R. 16).*

* One check, in the amount of $2,933.75, was drawn to the Richard Shipping Corporation, the customs house broker of Rayon #1 (R. 16).

These checks were not, however, handed over to Rayon #1 and Nyrayco by the Collector of Customs in view of the fact that both corporations had been dissolved (R. 17). Instead, the Collector of Customs caused the checks to be transmitted to the General Accounting Office "for lawful disposition" (R. 17).[7]

Rayon #2 thereafter requested the General Accounting Office to deliver the above-described checks to it (R. 17). This request was denied, and the Comptroller General deposited the proceeds of the checks in the Treasury in a trust fund entitled "Outstanding Liabilities 1938," pursuant to Section 21 of the Act of June 26, 1934, c. 756, 48 Stat. 1235, 31 U. S. C. 725t.[8] The proceeds still re-

[7] The court below found that the fact of the dissolution of Nyrayco for nonpayment of its franchise taxes was never brought to the attention of the United States Customs Court in connection with the proceedings therein (R. 16). No finding was made with regard to knowledge of the voluntary dissolution of Rayon #1. However, it is obvious that, after the checks were issued and delivered to the Collector of Customs, he had become aware of the dissolution of both corporations (R. 17).

[8] In its opinion, the court below states that the General Accounting Office refused payment of the refund checks, after certification by the Collector of Customs of the amount due and the drawing of the checks by the appropriate disbursing officer (R. 21, 22). As shown above, the Collector of Customs was the prime mover in stopping the delivery of the refund checks after they had been drawn. Thereafter, he forwarded the checks to the General Accounting Office "for lawful disposition" with full notice of the difficulties as to payment which had arisen by reason of the corporate reorganizations and dissolutions set out above. The establishment of the Treasury trust fund mentioned above took place thereafter.

main credited in that account to Rayon #1 and Nyrayco (R. 17).

Certain efforts were made by Rayon #1, Rayon #2 and Nyrayco and their representatives to obtain the Treasury fund. First, a consent decree was entered in a declaratory judgment proceeding in the Supreme Court of the State of New York adjudicating that, as between the three corporations, Rayon #2 was the owner of the customs duty refunds (R. 17). This consent judgment was entered on January 24, 1942, and was forwarded to the General Accounting Office on January 30, 1942, together with a written demand by Rayon #2 for payment to it of the proceeds of the checks (R. 17). The General Accounting Office did not accede to this demand (R. 17). Subsequently, on February 26, 1943, the attorneys for the three dissolved corporations suggested to the Comptroller General that the fund be released to Rayon #1 and Nyrayco with the consent of Rayon #2, each corporation being represented by its director or directors as trustees in liquidation (R. 17–18). The Comptroller General rejected this scheme and stated that payment would be permitted only upon final judgment by a court of competent jurisdiction concluding the issue of ownership. (R. 18.) He suggested that a suit be brought for this purpose in the Court of Claims (R. 18).

As mentioned above, the offer made by the attorneys for the three dissolved corporations on

February 26, 1943, referred to directors of such corporations as trustees in liquidation. Of the three directors of Rayon #1 at the time of its dissolution, two (Max Spinnler and Austin E. Kilkenny) had died by April 1, 1935 (R. 18). On and after that date and at the time of the rendition of the Customs Court's decisions, Charles A. Springstead was the sole surviving director (R. 18). The court below found that, on April 20, 1938, Springstead held a directors' meeting and elected Alfred L. Rose as a director, and Rose and Springstead thereupon elected Norman S. Goetz (R. 18).[9] Of the three directors of Nyrayco at the time of its dissolution, one (Max Spinnler) had died on April 1, 1935 (R. 19); a second (Martin Lowenberg) had resigned on January 22, 1942 and, on and after that date, Samuel W. Lowenberg was the sole surviving director (R. 19). The court below found that, at a meeting of the board of directors of Nyrayco on January 22, 1942, Samuel W. Lowenberg elected Alfred L. Rose as director, and Lowenberg and Rose elected Norman S. Goetz (R. 19).[10] At the time of

[9] Springstead, Rose, and Goetz appeared in the court below as representative plaintiffs in Docket No. 45862 (R. 19).

[10] None of these directors appeared as representative plaintiffs in the court below in Docket No. 45863, the suit brought by Nyrayco. Both Martin Lowenberg and Samuel W. Lowenberg, the latter individually and as attorney in fact for relatives of the deceased Max Spinnler, were ordered to appear before the court below to assert any interest which they might have in the suits (R. 20). No appearance was entered by either (R. 21).

the dissolution of Rayon #2, its directors were Rose, Spinnler and one Hartley Robbins; one vacant directorship existed (R. 19). As noted above, Spinnler died in April, 1935. Robbins died on May 25, 1938 (R. 19). The court below found that, at a meeting of the board of directors of Rayon #2 on June 10, 1938, Rose elected Norman S. Goetz as director, Goetz and Rose elected Walter Mendelsohn, who joined with them to elect Bernard D. Lang (R. 19–20).[11]

Following the suggestion of the Comptroller General that suit be brought in the Court of Claims to determine the question of ownership of the customs duty overpayment fund, the three proceedings mentioned above (*supra*, pp. 2–3) were instituted by complaints filed on April 29, 1943 (R. 20). Amended complaints were filed on January 21, 1944 (R. 20).

On February 4, 1946, the Court of Claims concluded that the respondents herein, Rayon #2, and Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn and Bernard D. Lang, as its liquidating directors and trustees, were entitled to the customs duty fund (R. 21, 27). The court further ordered that the petitions filed by Rayon #1 and its liquidating directors, and by Nyrayco, be dismissed (R. 21). As part of its decision in favor of respondents herein, the court below

[11] Rose, Goetz, Mendelsohn, and Lang appeared in the court below as representative plaintiffs in the instant case (R. 20).

awarded 6% interest on the total fund, such interest to run from April 19, 1941 (R. 21).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to hold that Section 177 (a) of the Judicial Code precluded it from allowing interest upon the instant claim against the United States prior to the time of the rendition of its judgment.

2. In holding itself generally empowered to award interest against the United States whenever, in its opinion, officials of the Government have withheld payment of claims against the Government for more than a reasonable length of time.

3. For failing to hold that interest may not be awarded against the United States in the absence of a specific statutory authorization for such an award.

4. In awarding interest against the United States on judgments of the United States Customs Court despite provisions of the Customs Regulations which expressly prohibit interest on such decisions.

5. In including in its judgment interest on the claim here involved for a period prior to the rendition of such judgment.

REASONS FOR GRANTING THE WRIT

1. No principle of public law is more clearly established than the rule that "* * * the United States are not liable to pay interest

on claims against them, in the absence of express statutory provision to that effect." *Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *Goltra*, 312 U. S. 203, 207; *Smyth* v. *United States*, 302 U. S. 329, 353; *United States* v. *North Carolina*, 136 U. S. 211, 216; *United States* v. *Sherman*, 98 U. S. 565; 7 Op. A. G. 523; 3 Op. A. G. 635. This "* * * traditional immunity * * *" (*United States* v. *Goltra*, supra at p. 207) is specifically embodied in Section 177 (a) of the Judicial Code which prohibits the allowance of interest by the Court of Claims prior to the date of that Court's judgment unless the claim is founded on a contract expressly stipulating for the payment of interest. *United States* v. *North American Co.*, 253 U. S. 330, 336; *United States* v. *Verdier*, 164 U. S. 213, 218.

In its award of interest to respondents herein, the court below acted in complete disregard of the Government's general immunity from such an award nor did it refer to the specific statutory limitation on its own power in this respect. There is, of course, no express contract stipulation herein which would permit the award. Nor is there any specific statutory provision to work an exception to Section 177 (a) in the circumstances of this case.[12] The court below baldly assumed

[12] In its opinion, the court below referred to its allowance of interest as being on "* * * the judgments of the Customs

a general power to award interest on claims against the United States whenever, in its opinion, Government officials (in this case, the Comptroller General) take more than a reasonable time to

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Court * * *" (R. 26). No provision of customs law authorizes the payment of interest on customs duty refunds pursuant to Customs Court decisions. On the contrary, regulations issued by the Treasury Department specifically prohibit such payments of interest. Customs Regulations, 1931, Art. 862, pp. 536–537; Customs Regulations, 1937, Art. 861, p. 490; Customs Regulations, 1943, Art. 17.4, p. 327, and Art. 24.36, p. 456, ftn. 6; Cf. *United States* v. *Sherman*, *supra*; *Stephani's Case*, 26 Int. Rev. Rec. 313, 314; *White* v. *Arthur*, 10 Fed. 80 (S. D. N. Y.). No exception to the prohibition of these customs regulations is provided by the appropriation acts which, as found by the court below, covered the refunds here involved (R. 17). Both such acts (Act of May 14, 1937, 50 Stat. 137, 142; Act of June 25, 1938, 52 Stat. 1114, 1149) are silent on the question of the allowance of interest on refunds. See 7 Op. A. G. 523, 525.

Some effort was made by respondents in the court below to claim interest under the provisions of the Act of March 3, 1875, c. 149, 18 Stat. 481, as amended, 31 U. S. C. 227. This statute, which applies exclusively to setoffs urged by the United States in respect of judgments against the United States presented for payment, is clearly not applicable in the instant case. Here, no setoff on the part of the United States was involved. The refusal of the Collector of Customs and of the General Accounting Office to turn the customs duty overpayment checks or the proceeds over to respondents arose solely in the exercise of a reasonable caution by those officials in the performance of their duties. Moreover, it may well be doubted that a "judgment" of the Customs Court is the type of judgment to which the Act refers. A decision of the Customs Court is a declaratory decree, *Brook* v. *Mantel-Witté Co.*, 54 F. 2d 992, 994 (C. C. A. 2), and not a money judgment.

act on the demands of private claimants.[13] Although the court below recognized the facts and circumstances of this case as a "* * * maze of reorganizations and transfers of assets and confusion * * *", and commended the desire of the Comptroller General to protect the interests of the United States, it nevertheless found that the burden of establishing valid ownership of the customs duty fund had somehow shifted to the Government and that the problem should have been clearly resolved by the Comptroller General by April 19, 1941 (R. 25–26).[14] We do not believe

[13] That this is not an isolated instance of the improper allowance of interest by the court below is evidenced by its decision in *Thayer-West Point Hotel Co.* v. *United States*, No. 45874, decided March 4, 1946. In that case the decision allowing interest is in clear conflict with applicable decisions of this Court, e. g., *United States* v. *Goltra*, *supra*. A petition for a writ of certiorari is also being filed in that case.

[14] A primary issue in the court below was the question of the capacity of Nyrayco to appear as plaintiff in the United States Customs Court after it had been abolished by proclamation for nonpayment of franchise taxes. The court below decided that Nyrayco's lack of capacity had been cured by an amendment to the New York Corporation Law on April 19, 1941 and chose this date to start the running of interest against the Government. There is nothing in the record to suggest that the caution exercised by the Comptroller General with regard to release of the customs duty fund stemmed solely from doubt as to Nyrayco's status as a plaintiff in the Customs Court proceeding. Further, it should be noted that the date chosen by the court below to start the running of interest was almost a year before the consent declaratory judgment obtained by respondents in the New York Supreme Court and substantially two years before attorneys for the interested corporations offered to give consent of Rayon #2 if the fund were released to Rayon #1 and Nyrayco.

that the Comptroller General acted unreasonably in insisting that the United States be protected by the judgment of a court of competent jurisdiction. But even if it be assumed that his actions herein were unreasonable, it does not follow that any power thereupon arose in the Court of Claims to award interest to respondents. On the contrary, this Court has specifically held that Section 177 (a) prohibits the allowance of interest by the Court of Claims even if payments have been unreasonably delayed by officers of the Government. *Tillson* v. *United States*, 100 U. S. 43; *United States* v. *Verdier, supra*, at p. 218.

2. The question here presented is one of importance. As a matter of law, the court below should not be permitted to ignore Section 177 (a) of the Judicial Code and to extend a waiver of Governmental immunity contrary to the legislative mandate. As a monetary matter, the general importance of the review sought herein can not be overemphasized. An unpredictable increase in the financial burden of the Government would result if trial courts should be left entirely free to award interest in cases where they find that there has been improper delay by Government officials in the payment of money found to be due to claimants. In the case at bar, for example, the interest alone exceeds $100,000.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

APRIL 1946.

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Nos. 94 and 96

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES, PETITIONER

v.

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL.

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL., PETITIONERS

v.

UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 94

UNITED STATES, PETITIONER

v.

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL.

No. 96

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL., PETITIONERS

v.

UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 21–27) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on February 4, 1946 (R. 27). The petition for a writ of certiorari in No. 94 was filed on April 30, 1946, and the cross-petition for a writ of certiorari in No. 96 was filed on May 1, 1946. Certiorari was granted in both cases on October 14, 1946 (R. 28). The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288 (b).

QUESTIONS PRESENTED

1. Whether the Court of Claims, in holding in favor of the claimants in one of three related suits brought to determine the ownership of a customs duty overpayment fund, can include in its judgment against the United States interest on the fund for a period prior to the entry of judgment, notwithstanding the provisions of Section 177 (a) of the Judicial Code.

2. Whether the Act of March 3, 1875, *infra*, which provides that interest may be recovered from the United States where the Comptroller General suspends payment of a judgment in order to litigate an asserted counterclaim on behalf of the United States and is unsuccessful therein, has any applicability to the instant case.

STATUTES AND REGULATIONS INVOLVED

The pertinent part of Section 177 (a) of the Judicial Code, 28 U. S. C. 284, provides:

> (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, * * *.

The Act of March 3, 1875, 18 Stat. 481, as amended by the Act of March 3, 1933, c. 212, Title II, Section 13, 47 Stat. 1516, 31 U. S. C. 227, provides:

> When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of

the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff.

The pertinent provisions of the Customs Regulations are set out in Appendix B, *infra*, pp. 49–52.

STATEMENT

The instant proceeding (Docket No. 45861 in the Court of Claims) was one of three related suits filed in the court below for the purpose of ascertaining the party or parties entitled to a fund which had been set up as an outstanding liability in the Treasury by direction of the General Accounting Office. The respondents in No. 94 in this Court are N. Y. Rayon Importing Co.,

Inc. (#2)[1] and its "liquidating directors and trustees."[2] In No. 45862, the plaintiffs were N. Y. Rayon Importing Co., Inc. (#1)[3] and its "liquidating directors and trustees." In No. 45863, the plaintiff was Nyrayco Importing & Converting Corporation.[4] The circumstances which raised the question of ownership of the customs duty overpayments and led to the establishment of the fund in the Treasury are as follows:

Rayon #1 was incorporated under New York law on April 26, 1923 (R. 9). Its original name was "N. Y. Artificial Silk Importing Co., Inc." which name was changed to N. Y. Rayon Importing Co., Inc., by certificate filed on May 4, 1925 (R. 9). Nyrayco was incorporated under New York law on January 30, 1928 (R. 9). Both corporations were engaged in the importation of rayon yarn and, between 1925 and 1929, had paid customs duties on such importations (R. 10). Both corporations claimed that the duties assessed were erroneous and, prior to March 1, 1930, had filed protests with the Collector of Customs in accordance with applicable Tariff Act provisions,

[1] Hereinafter called Rayon #2.

[2] Rayon #2 and its liquidating directors and trustees are the petitioners in No. 96 but will hereinafter be referred to as the respondents.

[3] Hereinafter called Rayon #1.

[4] In all three cases, the Societé Pour Nouveaux Placements de Capitaux was impleaded as plaintiff. The court below dismissed "all claims of interest" of this company (R. 27).

which resulted in the institution of actions in the United States Customs Court (R. 10).

Rayon #2 was incorporated under New York law on March 1, 1930, for the purpose of acquiring all the assets and assuming all the liabilities of Rayon #1, Nyrayco, and two other corporations in the rayon business, Rayseta Yarns Corp. and Rayonese Yarns Corp. (R. 9–10). On that day, meetings of the boards of directors of these various corporations were held to formalize this reorganization (R. 10). Pursuant to a resolution of its board of directors, Rayon #2 offered to acquire from Rayon #1, Nyrayco, Rayseta, and Rayonese the assets of those corporations and to assume their liabilities in consideration of the issuance by Rayon #2 to those corporations, or their nominees, of capital stock of Rayon #2 (R. 10). By resolutions of the respective boards of directors, this offer was accepted by Rayon #1, Nyrayco, Rayseta, and Rayonese, and all assets of the latter four corporations were transferred to Rayon #2 (R. 10).[5] Between March and June 1930, all is-

[5] The details of these corporate activities on March 1, 1930, are set out in the findings of the court below (R. 10–15). The findings as to the offer by Rayon #2 on March 1, 1930, and its acceptance by the four other corporations on that date (R. 10–12) are duplicated by findings of offers, apparently cross-offers, made by Rayon #1 and Nyrayco to Rayon #2 on March 4, 1930, four days later (R. 13–14). The court below referred to these offers of March 4 as offers which had been accepted by Rayon #2 at a meeting of its board of directors on March 1, 1930 (R. 12–13). The offers made by Rayon #1

sued and outstanding shares of stocks in Rayon #1, Nyraco, Rayseta, and Rayonese were delivered to Rayon #2, which took over the business and all assets of the four transferring corporations and, in turn, issued to their nominee 1,800 shares of capital stock (R. 14).[5]

On February 27, 1930, a few days prior to the reorganization date mentioned above, Rayon #1 filed a verified application for dissolution with the New York State Department of Taxation and Finance (R. 14–15). The application stated that March 1, 1930, was the date of discontinuance of business, that all of the assets of Rayon #1 had been disposed of, and that Rayon #2 acquired the assets of Rayon #1 and would continue the business formerly conducted by Rayon #1 (R. 15).

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and Nyrayco on March 4, 1930, each refer to an attached schedule of corporate assets and liabilities; no such schedules were ever submitted with or attached to the offers (R. 14). Written consents of the stockholders of record of Rayon #1 and Nyrayco to the transfer of all assets of these corporations to Rayon #2 were not signed until some years after the reorganization, by which time at least two of the corporations (Rayon #1 and Rayon #2) had been voluntarily dissolved (R. 14).

[5] Prior to the reorganization discussed above, a French corporation known as Comptoir des Textiles Artificiel was equitable owner of all outstanding shares of stock of Rayon #1, Nyrayco, Rayseta, and Rayonese (R. 15). Rayon #2 became the legal owner and holder of such shares of stock pursuant to the reorganization and, in turn, issued all of its capital stock to the Societé Pour Nouveaux Placements de Capitaux, a Swiss corporation controlled by the above-mentioned French corporation (R. 15).

On March 1, 1930, a Certificate of Dissolution was issued by the New York Secretary of State (R. 15).

Rayon #2 was voluntarily dissolved on January 9, 1931, by the filing of an application in compliance with the New York law, and the issuance of a Certificate of Dissolution by the New York Secretary of State (R. 15–16). Nyrayco was dissolved on December 16, 1935, by proclamation, under Section 203–a of the New York Tax Law, for nonpayment of franchise taxes (R. 16).

Some time after the above-described reorganization and the dissolution of all three corporations, the United States Customs Court rendered decisions sustaining the protests which had been filed by Rayon #1 and Nyrayco in connection with the assessment of duties on rayon yarn imported between 1925 and 1929 (R. 16). The decisions were rendered on April 30, 1937, and May 6, 1937, and a reliquidation of the customs entries was directed (R. 16). On reliquidation, the Collector of Customs ascertained that a refund of $362,482.71 was payable to Rayon #1 and $30,809.75 to Nyrayco (R. 16). After due certification for payment by the Collector of Customs, checks were drawn by the Chief Disbursing Officer of the United States, payable respectively to Rayon #1 and Nyrayco (R. 16).[1] These checks were not;

[1] One check, in the amount of $2,933.75, was drawn to the Richard Shipping Corporation, the customs house broker of Rayon #1 (R. 16).

however, handed over to Rayon #1 and Nyrayco by the Collector of Customs in view of the fact that both corporations had been dissolved (R. 17). Instead, the Collector of Customs caused the checks to be transmitted to the General Accounting Office "for lawful disposition" (R. 17).[8]

Rayon #2 thereafter requested the General Accounting Office to deliver the above-described checks to it (R. 17). This request was denied, and the Comptroller General deposited the proceeds of the checks in the Treasury in a trust fund entitled "Outstanding Liabilities 1938," pursuant to Section 21 of the Act of June 26, 1934, c. 756, 48 Stat. 1235, 31 U. S. C. 725t.[9]

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[8] The court below found that the fact of the dissolution of Nyrayco for nonpayment of its franchise taxes was never brought to the attention of the United States Customs Court in connection with the proceedings therein (R. 16). No finding was made with regard to knowledge of the voluntary dissolution of Rayon #1. However, it is obvious that, after the checks were issued and delivered to the Collector of Customs, he had become aware of the dissolution of both corporations (R. 17).

[9] In its opinion, the court below states that the General Accounting Office refused payment of the refund checks, after certification by the Collector of Customs of the amount due and the drawing of the checks by the appropriate disbursing officer (R. 21, 22). As shown above, the Collector of Customs was the prime mover in stopping the delivery of the refund checks after they had been drawn. Thereafter, he forwarded the checks to the General Accounting Office "for lawful disposition" with full notice of the difficulties as to payment which had arisen by reason of the corporate reorganizations and dissolutions set out above. The establishment of the Treasury trust fund mentioned above took place thereafter.

Certain efforts were made by Rayon #1, Rayon #2, and Nyrayco, and their representatives, to obtain the Treasury fund. First, a consent decree was entered in a declaratory judgment proceeding in the Supreme Court of the State of New York adjudicating that, as between the three corporations, Rayon #2 was the owner of the customs duty refunds (R. 17). This consent judgment was entered on January 24, 1942, and was forwarded to the General Accounting Office on January 30, 1942, together with a written demand by Rayon #2 for payment to it of the proceeds of the checks (R. 17). The General Accounting Office did not accede to this demand (R. 17). Subsequently, on February 26, 1943, the attorneys for the three dissolved corporations suggested to the Comptroller General that the fund be released to Rayon #1 and Nyrayco with the consent of Rayon #2, each corporation being represented by its director or directors as trustees in liquidation (R. 17–18). The Comptroller General rejected this scheme and stated that payment would be permitted only upon final judgment by a court of competent jurisdiction concluding the issue of ownership (R. 18). He suggested that a suit be brought for this purpose in the Court of Claims (R. 18).

As mentioned above, the offer made by the attorneys for the three dissolved corporations on February 26, 1943, referred to directors of such

corporations as trustees in liquidation. Of the three directors of Rayon #1 at the time of its dissolution, two (Max Spinnler and Austin E. Killkenny) had died by April 1, 1935 (R. 18). On and after that date and at the time of the rendition of the Customs Court's decisions, Charles A. Springstead was the sole surviving director (R. 18). The court below found that, on April 20, 1938, Springstead held a directors' meeting and elected Alfred L. Rose as a director, and Rose and Springstead thereupon elected Norman S. Goetz (R. 18).[10] Of the three directors of Nyrayco at the time of its dissolution, one (Max Spinnler) had died on April 1, 1935 (R. 19); a second (Martin Lowenberg) had resigned on January 22, 1942 and, on and after that date, Samuel W. Lowenberg was the sole surviving director (R. 19). The court below found that, at a meeting of the board of directors of Nyrayco on January 22, 1942, Samuel W. Lowenberg elected Alfred L. Rose as director, and Lowenberg and Rose elected Norman S. Goetz (R. 19).[11]

[10] Springstead, Rose, and Goetz appeared in the court below as representative plaintiffs in Docket No. 45862 (R. 19).

[11] None of these directors appeared as representative plaintiffs in the court below in Docket No. 45863, the suit brought by Nyrayco. Both Martin Lowenberg and Samuel W. Lowenberg, the latter individually and as attorney in fact for relatives of the deceased Max Spinnler, were ordered to appear before the court below to assert any interest which they might have in the suits (R. 20). No appearance was entered by either (R. 21).

At the time of the dissolution of Rayon #2, its directors were Rose, Spinnler and one Hartley Robbins; one vacant directorship existed (R. 19). As noted above, Spinnler died in April, 1935. Robbins died on May 25, 1938 (R. 19). The court below found that, at a meeting of the board of directors of Rayon #2 on June 10, 1938, Rose elected Norman S. Goetz as director, Goetz and Rose elected Walter Mendelsohn, who joined with them to elect Bernard D. Lang (R. 19–20).[12]

Following the suggestion of the Comptroller General that suit be brought in the Court of Claims to determine the question of ownership of the customs duty overpayment fund, the three proceedings mentioned above (*supra*, pp. 4–5) were instituted by complaints filed on April 29, 1943 (R. 20). Amended complaints were filed on January 21, 1944 (R. 20).

On February 4, 1946, the Court of Claims concluded that the respondents herein, Rayon #2, and Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn, and Bernard D. Lang, as its liquidating directors and trustees, were entitled to the customs duty fund (R. 21, 27). The court further ordered that the petitions filed by Rayon #1 and its liquidating directors, and by Nyrayco, be dismissed (R. 21). As part of its decision in

[12] Rose, Goetz, Mendelsohn, and Lang appeared in the court below as representative plaintiffs in the instant case (R. 20).

favor of respondents herein, the court below awarded 6% interest on the total fund, such interest to run from April 19, 1941 (R. 21).

In No. 94, the Government petitioned for a writ of certiorari to obtain review of the action of the court below in awarding interest. In No. 96, the respondents filed a cross-petition urging that interest should have been allowed for a period beginning at the time of the issuance of the refund checks, rather than the later date used by the court below.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to hold that Section 177 (a) of the Judicial Code precluded it from allowing interest upon the instant claim against the United States prior to the time of the rendition of its judgment.

2. In holding itself generally empowered to award interest against the United States whenever, in its opinion, officials of the Government have withheld payment of claims against the Government for more than a reasonable length of time.

3. In failing to hold that interest may not be awarded against the United States in the absence of a specific statutory authorization for such an award.

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4. In awarding interest against the United States on judgments of the United States Customs Court despite provisions of the Customs Regulations which expressly prohibit interest on such decisions.

5. In including in its judgment interest on the claim here involved for a period prior to the rendition of such judgment.

SUMMARY OF ARGUMENT

I

This was one of three related proceedings brought in the court below to determine the ownership of a customs duty refund held in the Treasury as an outstanding liability. The Government's disbursing officers withheld payment, not because of any general denial of the Government's liability for the fund but because they were unwilling to assume the essentially judicial function of solving the complex question, arising out of activities of respondents and others, of ownership of the fund. The Government's disbursing officers did not deem an administrative decision as to the validity of assignments, the capacity of dissolved corporations to sue under state law, and the legal standing of various claimants to receive the fund, in any way adequate to protect the Government from the danger of multiple liability; consequently, they withheld payment until a final judicial determination, pro-

viding full protection to the Government's interest, could be obtained.

The court below resolved the question of ownership in favor of respondents but went far beyond its powers by assessing a substantial penalty against the Government in the form of an award of interest on the fund. Section 177 (a) of the Judicial Code forbids the Court of Claims to include interest in its judgments on claims against the United States unless the award is grounded on an express contractual stipulation or permitted by specific statutory provision. The award of interest in this proceeding does not fall within either of the exceptions to that Section. Nevertheless, the court below, ignoring Section 177 (a) and misconceiving both the Government's position and its own function in the proceeding, has here assumed a general power to award interest whenever its view of the circumstances of a particular case leads it to believe that such an award is warranted. We submit that the court below possesses no such power and that its action in awarding interest in this proceeding should be set aside.

Respondents contend that Section 177 (a) of the Judicial Code is not applicable here because the Section applies only to original claims and hence is not applicable to this proceeding which is based on a pre-existing judgment. But, in the first place, this was not a proceeding to enforce a

pre-existing judgment. It was, as we have stated above, one of three related proceedings brought to determine the ownership of an existing fund. The fund had come into existence after a Customs Court proceeding and a reliquidation of customs entries by the Collector of Customs. But no question of ownership was presented to, or adjudicated by, the Customs Court. That issue arose subsequent to the Customs Court proceedings and was first brought under adjudication by this suit and its companion proceedings in the court below. Moreover, the court below does not possess jurisdiction over a suit against the United States if the sole basis of jurisdiction urged is a prior judgment against the Government. It is only when such suits can be categorized as arising under a law of Congress that the court below has jurisdiction to entertain them. In such cases, Section 177 (a) is entirely applicable and awards of interest are forbidden unless specifically permitted by contract or statute. In the second place, even if it be assumed that Section 177 (a) does not apply to suits based on pre-existing judgments, that this suit was on such a judgment, and that the court below has jurisdiction over such suits, it does not follow that the award of interest by the court below in this proceeding is thereby validated. Judgments against the United States only bear interest pursuant to a specific statutory authorization. Congress has not author-

ized and does not intend the allowance of interest on Customs Court judgments. This is conclusively shown by the consistent administrative practice of the Treasury Department in denying payments of interest on customs refunds, and the acquiescence of Congress, on numerous occasions, in this construction of the applicable statutes and the administrative practice. Specific customs regulations, embodying this prohibition against awards of interest on customs refunds, were violated by the court below in awarding interest in this proceeding.

II

Respondents contend that the award of interest is validated by the Act of March 3, 1875, *supra*, pp. 3-4. This statute directs the Comptroller General to withhold payment from a judgment creditor if such creditor is indebted to the United States, and to cause suit to be brought on the asserted cross debt. It permits interest to be paid to the judgment creditor for the period of the withholding if the Government fails to substantiate its asserted set-off. We submit that this statute has no applicability to this proceeding. It was never intended to apply to a situation where payment of an acknowledged liability was withheld because the Government's disbursing officers were unable to ascertain the ownership of the fund in question in a manner which would

fully protect the Government from the danger of multiple liability. On the contrary, the Act of March 3, 1875 contemplates only a case involving the refusal by the Government, for set-off purposes, to pay an acknowledged liability to a fully identified claimant. This proceeding does not and did not involve the assertion of any cross debt or set-off by the United States and, accordingly, the statute has no applicability. We further suggest that the Act of March 3, 1875 is here inapplicable in that it contemplates only judgments which can be presented for payment, and that the Customs Court judgments herein, coupled with reliquidation by the Collector, constitute no more than "claims duly allowed by legal authority", a category which was deleted from the coverage of the 1875 Act by the 1933 amendment to it.

ARGUMENT

I

THE AWARD OF INTEREST AGAINST THE UNITED STATES WAS BEYOND THE POWER OF THE COURT OF CLAIMS

By this proceeding, and the companion suits brought by Rayon #1 and Nyrayco,[13] the Court of Claims was called upon to determine the ownership of a customs duty refund, held in the Treasury as an outstanding liability, of approxi-

[13] Nos. 45862 and 45863 in the Court of Claims. This proceeding was No. 45861 in the court below.

mately $400,000. The Government's disbursing officers had withheld payment, not because of any general denial of the Government's liability for the fund, but because of a complex situation, arising out of activities of respondents and others, in which an administrative decision as to ownership of the fund was deemed inadequate to protect the Government from the danger of multiple liability.[14]

The refund in issue resulted from a reliquidation of customs entries in conformity with a decision of the Customs Court. The customs duties had originally been paid by Rayon #1 and Nyrayco (R. 10), the protestants in the Customs Court action. Shortly after the refunds were awarded, respondent Rayon #2, claiming as successor to Rayon #1 and Nyrayco, demanded payment (R. 17). However, Rayon #2 was not a party to the Customs Court proceedings and the general assignments through which Rayon #2 asserted its rights were apparently void with respect to the customs claims under R. S. 3477 (31 U. S. C. 203),[15] a statute designed to protect the

[14] The Government may, of course, be subjected to multiple payments on the same claim when its fiscal officers choose the wrong claimant. See *United States* v. *Borcherling*, 185 U. S. 223.

[15] The general transfers of assets to Rayon #2 (R. 10–14), being voluntary assignments as distinguished from assignments by operation of law (compare *Western Pac. R. Co.* v. *United States*, 268 U. S. 271, 275) and taking place prior to the Customs Court award, may well have been void insofar

Government from the "* * * danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability." *Martin* v. *National Surety Co.*, 300 U. S. 588, 594; *Hobbs* v. *McLean*, 117 U. S. 567, 576. Moreover, Rayon #1 and Nyrayco, as well as Rayon #2, had each ceased doing business and had been dissolved long before the decision of the Customs Court (R. 15–16). The fact that Nyrayco had been dissolved by proclamation for nonpayment of franchise taxes was never brought to the attention of the Customs Court (R. 16).[16]

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as they purported to assign to Rayon #2 the claims of Rayon #1 and Nyrayco for refund of customs duties. R. S. 3477 provides that "all transfers and assignments made of any claim upon the United States * * * shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *" *The John Shillito Co.* v. *McClung*, 51 Fed. 868, 877 (C. C. A. 6). Moreover, the transfers did not meet the formal requirements of an assignment of claims against the United States as set forth in R. S. 3477. *Spofford* v. *Kirk*, 97 U. S. 484; *United States* v. *Gillis*, 95 U. S. 407; *H. M. O. Lumber Co.* v. *United States*, 40 F. 2d 544 (W. D. Mich.).

[16] Under New York law, it was doubtful whether a corporation, which had been abolished by proclamation for nonpayment of franchise taxes, had capacity to maintain a suit. The cases were in conflict. Compare *Douglas* v. *Perlstein*, 170 Misc. 561 (right to sue upheld), and *Application of S. M. & J. Eisenstadt, Inc.*, 256 App. Div. 488, affirmed, 283 N. Y. 578 (right to sue denied). The court below decided that this uncertainty was not removed until two successive amendments to the New York Corporation Law were enacted by the legislature in 1940 and 1941 (R. 23–26).

Nor does the record show that the respondents ever disclosed the dissolution of Rayon #1 and Rayon #2 to that court. Additional complexities arose through the death of corporate officials (R. 18, 19) and the presence of foreign corporations with beneficial or legal rights in the stock of the dissolvee corporations involved (R. 15).

The Government's disbursing officers were thus confronted with the necessity of resolving questions as to the validity of assignments, the capacity of dissolved corporations to sue under state law, and the legal standing of various claimants to receive the fund after it had been established, in order to determine ownership of the fund.[17] They were unwilling to assume this essentially judicial function (*United States* v. *Borcherling*, 185 U. S. 223, 234–235; *Martin* v. *National Surety Co.*, 300 U. S. at 595) and, they therefore decided to withhold payment until such time as a final judicial determination, providing an acquittance fully protective of the Government's interest, should be obtained. The proceedings below resulted in such a determination, binding not only the three primary claimants but also all other impleaded and cited parties. In these proceedings,

[17] Even after the facts were marshalled before it, the court below described the case as presenting a "* * * maze of reorganizations and transfers of assets and confusion * * *" (R. 25) with issues "confused by the dissolution and reorganization of corporations, stock transfers and board meetings, as well as the numerous parties to the various transactions * * *" (R. 22).

the Government stood as stakeholder, the "* * * fund * * * in court to be distributed to rival claimants, with the Government discharged irrespective of the outcome." *Martin* v. *National Surety Co.*, 300 U. S. at 595.[18]

The court below, in determining the ownership of the fund, performed one of the functions for which it was created. *United States* v. *Borcherling*, 185 U. S. at 234. However, in assessing a substantial penalty against the Government in the form of interest, it went far beyond its powers. We submit that its action in awarding interest should be set aside.

[18] Respondents, in seeking to emphasize the fact that the Government did not offer evidence in the court below (Br. in Op. 5), misconceive the Government's position in the litigation. As stated above, the Government never denied its obligation to pay the fund to its rightful owner; the problem was the determination of the rightful owner by a court of competent jurisdiction. Similarly, respondents' statements to the effect that the Government conceded its liability to pay the claim of Rayon #1 (Br. in Op. 5; Pet. 9) and that the Government conceded the valid ownership by Rayon #2 of the customs refund claims of Rayon #1 and Nyrayco (Br. in Op. 5), are inaccurate. Again, the Government merely conceded its liability to pay the fund to someone; it did not concede any liability to pay any part of the fund to any particular claimant, the very issue on which it desired the judgment of the court below.

It should be noted that the Government did controvert one issue, the question of Nyrayco's capacity to appear as plaintiff in the Customs Court after it had been abolished for nonpayment of franchise taxes. The confused state of New York decisional law on this point and on the history of New York Corporation Law amendments is discussed in the opinion below (R. 23–26; see also *supra*, note 16, p. 20).

A. *The award of interest was barred by Section 177 (a) of the Judicial Code.*

By Section 177 (a), the Court of Claims is forbidden to include interest in its judgments on claims against the United States. This statutory limitation on the powers of the court below, an integral part of the Government's waiver of immunity as to cases cognizable in that court, embodies the traditional immunity of the sovereign from payment of interest on claims against it. *United States* v. *Goltra*, 312 U. S. 203, 207; *Smyth* v. *United States*, 302 U. S. 329, 353; *United States* v. *North Carolina*, 136 U. S. 211, 216; *Angarica* v. *Bayard*, 127 U. S. 251, 260. Section 177 (a) permits of two specific exceptions: interest on claims before it may be awarded by the Court of Claims where the award is grounded on an express contractual stipulation or when it is permitted by a specific statutory provision. *United States* v. *North American Co.*, 253 U. S. 330, 336; *United States* v. *Verdier*, 164 U. S. 213, 218. Absent the specific basis of exception, the limitation of Section 177 (a) is absolute. Here, of course, there was no contractual stipulation, and the appropriation acts which covered the refunds here involved (R. 17) contained no provision permitting an allowance of interest. Act of May 14, 1937, 50 Stat. 137, 142; Act of June 25, 1938, 52 Stat. 1114, 1149.

The court below, in awarding interest herein, completely ignored the statutory limitation thus placed on its own power. It rested its award on reasons which are questionable even apart from Section 177 (a), wholly irrelevant to a determination of whether Section 177 (a) applies here. First, the court chose to start the running of interest on a date (April 19, 1941) which only had significance with respect to Nyrayco's capacity to sue (R. 26). This was the date of a second amendment to the New York Corporation Law which retroactively clarified the capacity to sue of involuntarily dissolved corporations. See *supra*, note 16, p. 20. The court below described this amendment as having "* * * made clear the right of corporations dissolved under the tax law to maintain suits * * *" (R. 25). To the extent that the amendment is relevant at all, it merely clarified Nyrayco's status in the customs suit; it had no bearing on the rights of any of the other parties, and could not determine the question of ownership of the fund. Conceding that no allowance of interest would be "* * * right or just * * *" prior to April 19, 1941 (R. 25), the court below nevertheless sought to utilize the amendment and its date as a justification and point of departure for the allowance of interest on both customs court judgments, one in

favor of Nyrayco and the other in favor of Rayon #1." We submit that if the Comptroller General was justified in withholding payment before that date—as the court below conceded—, he was justified in withholding payment thereafter, because the state law amendment did not resolve the primary issue presented below, namely, the ownership of the refund.

Further, the court below, after admitting that arrangements short of judicial determination might not have sufficiently protected the United States,[20] stated that the Comptroller General "* * * could have suggested * * *" a suit in the Court of Claims, but that he did not so suggest until 1942 (R. 25–26). This was found to furnish "* * * an added reason * * *" for allowing interest after April 19, 1941 (R. 26).

[19] The date chosen by the court below to start the running of interest was almost a year before the consent declaratory judgment obtained by respondents in the New York Supreme Court (R. 17), and substantially two years before attorneys for the interested corporations offered to give the consent of Rayon #2 if the fund were released to Rayon #1 and Nyrayco (R. 17–18).

[20] The suggestion of the court below that the Comptroller General "* * * could have permitted transfers and assignments by all interested parties * * *" (R. 26) again ignores the complexities here, involving both state and federal law, which confronted the Government's fiscal officers. These complexities the judgment of the court below resolved without elucidation. In any event, the suggestions made by the court below afford no justification for its defiance of Section 177 (a).

These reasons offered by the court below in support of its award of interest are in themselves inconsistent and incorrect, and indicate a misconception of the position of the Government's disbursing officers and the court's own function. The Comptroller General is improperly credited with judicial power to resolve the issue of ownership by a protective decree, a power which the court below alone possessed. Cf. *United States* v. *Borcherling*, 185 U. S. at 234. At the same time, the Comptroller General is criticized for not having "suggested" a suit against the United States earlier than 1942, a criticism which necessarily recognizes the need for a judicial determination of the question of ownership. The burden of establishing ownership of the fund did not shift to the Comptroller General, nor could the date of his suggestion of suit in the court below have any relevance to the allowance of interest. While addressing itself to a supposed duty in the Comptroller General, the court below ignored the primary duty of the respondents to establish that they were entitled to the fund. Cf. Customs Regulations, 1931, Art. 1191, p. 736, Appendix B, *infra*, p. 49. If the respondents were competent to receive the fund, they were free to resort to suit in the Court of Claims at any time after the initial withholding, and thus cannot be absolved of responsibility for the delay in the determina-

tion of ownership.[21] Yet the court below has not merely absolved respondents of such responsibility but has rewarded them with interest for a period of delay which they might have avoided. If the respondents were not competent to bring the suit, the Government should not be penalized for their incompetency.

We do not believe that the Comptroller General here acted unreasonably in withholding payment until the ownership of the customs refund had been determined by a court of competent jurisdiction. But even if it be assumed that his actions were unreasonable, it does not follow that any power thereupon arose in the Court of Claims to override Section 177. (a) of the Judicial Code and to award interest to the respondents. On the contrary, this Court has consistently held that that Section prohibits the allowance of interest even if payments have been unreasonably delayed by officers of the Government. *Tillson* v. *United States,* 100 U. S. 43; *United States* v. *Verdier,* 164 U. S. 213, 218. Without regard to these well-

[21] The consent declaratory judgment obtained by the respondents in the Supreme Court of New York in 1942, and their offer to furnish releases (R. 17–18) only affected rights as between Rayon #1 and Nyrayco, on the one hand, and Rayon #2 on the other. This non-adversary proceeding provided no protection to the Government as against the other possible claimants who were subsequently impleaded and cited in the Court of Claims action (R. 26). Cf. *United States* v. *Borcherling,* 185 U. S. at 235.

established principles and in defiance of the statutory prohibition, the court below has baldly assumed a general power to award interest on claims against the United States whenever its view of the circumstances of a particular case leads it to believe that such an award is warranted. We submit that the court below possesses no such power.

Respondents urge, however, that Section 177 (a) of the Judicial Code is not applicable because that Section applies "* * * only to original claims which have not previously been reduced to judgment * * * ," and this proceeding "* * * was based on pre-existing judgments" (Br. in Op. 7). We submit that there is no merit to this contention. As already stated, *supra*, pp. 4–5, 18, this was one of three related proceedings brought in the court below to determine the ownership of a fund. The fund resulted from a Customs Court decision on a point of customs classification and a subsequent reliquidation of customs entries by the Collector, and was thereafter carried in the Treasury Department as an admitted debt of the Government. But the problem litigated below, the question of ownership of the fund, was never before the Customs Court. That question was brought under adjudication for the first time by this suit and its companion pro-

ceedings."[2] Indeed, Rayon #2, and its liquidating directors, the successful claimants in the court below and the parties with whose rights we are now concerned, were not even parties to the Customs Court proceeding (R. 10, 16). Thus, this proceeding was in no sense a suit to enforce a judgment. On the contrary, it was part of a consolidated litigation, instituted in the court below for the purpose of determining ownership of an existing fund.

Were the respondents' view of this proceeding as a suit to enforce a prior judgment a correct one, the court below would have had no jurisdiction. The Court of Claims lacks power to entertain a suit against the United States if the sole basis of jurisdiction is a prior judgment against the United States. *Hetfield* v. *United States*, 78

[2] In this proceeding (No. 45861 in the Court of Claims), respondents prayed for judgment for the entire fund (R. 6–7). In No. 45862 in the Court of Claims, the suit brought by Rayon #1, the complaint prayed for judgment in the amount of $362,482.71, that portion of the fund which derived from the customs proceeding brought by Rayon #1. In No. 45863 in the Court of Claims, the suit brought by Nyrayco, the complaint prayed for judgment in the amount of $30,809.75, that portion of the fund which derived from the customs proceeding brought by Nyrayco. Both Rayon #1 and Nyrayco alleged the reorganization of 1939 with its transfer of their assets to Rayon #2, but further alleged that, as a matter of law, the ownership of their respective claims for the refund of customs duties remained in them.

C. Cls. 419.[23] Suits involving preexisting judgments against the United States or assumed by the United States can only come within the jurisdiction of the Court of Claims when they also fall into the category of claims arising under a law of Congress. Section 145 of the Judicial Code, 28 U. S. C. 250 (1); *Hetfield* v. *United States,* 78 C. Cls. at 422; *Benedict* v. *United States,* 66 C. Cls. 437; *Bloodgood* v. *United States,* 39 C. Cls. 69. The "law of Congress" is customarily an appropriation act and such suits are characterized as suits to obtain a fund. Section 177 (a) is applicable in such proceedings unless the appropriation act involved specifically permits an allowance of interest. *Benedict* v. *United States, supra,* at 438, 444; *Bloodgood* v. *United States, supra;* cf. *New York Central and Hudson River R. R. Co.* v. *United States,* 24 C. Cls. 22, 30. As has been noted, *supra,* p. 23, the appropriation acts which covered the refunds here involved (R. 17) contain no such provision.

Thus, respondents' contention that the prohibition of Section 177 (a) does not apply because this

[23] To support the contention that Section 177 (a) is not applicable to pre-existing judgments, respondents quote a dictum from *Stewart & Co.* v. *United States,* 71 C. Cls. 126, 131. The *Stewart* case involved an asserted set-off by the United States against a claimant who had obtained a prior judgment in the Court of Claims. The case, since it involved a set-off, came within the Act of March 3, 1875, *supra,* insofar as the question of interest is concerned. The *Stewart* case is discussed in *Hetfield* v. *United States, supra,* at 421–422.

proceeding was a suit on a preexisting judgment cannot advance their cause. The proceeding was in fact one to determine the ownership of an existing fund and, even if considered as based upon a preexisting judgment, is subject to the bar of Section 177 (a) in the absence of specific authorization to the contrary.

B. *Even if it be assumed that Section 177 (a) is inapplicable to suits on pre-existing judgments, and that this was such a suit, the award of interest herein was beyond the power of the court below*

Respondents' effort to avoid the prohibition of Section 177 (a), by emphasizing that this proceeding was based on pre-existing judgments, seems to assume that judgments against the United States automatically bear interest. There is no warrant for this assumption. Judgments against the United States, like other claims against the United States, only bear interest pursuant to a specific statutory authorization. For example, judgments of the Court of Claims do not bear interest unless the United States unsuccessfully appeals to this Court from an adverse judgment. Act of September 30, 1890, as amended, 26 Stat. 537, 31 U. S. C. 226. Even under this narrow authorization, payment of interest is not permitted to run after the term of this Court in which the Court of Claims judgment is affirmed. *Ibid.* District Court judgments under the Tucker Act bear

interest from the date of final judgment until the date when an appropriation is made for the payment of the judgment. Act of March 3, 1887, as amended, Section 10, 24 Stat. 507, 28 U. S. C. 765. Section 411 of the Federal Tort Claims Act incorporates the Tucker Act provision with regard to interest on judgments. Act of August 2, 1946, Pub. L. 601, 79th Cong., 2nd Sess. See also Suits in Admiralty Act, Section 3, 41 Stat. 526, 46 U. S. C. 743; Public Vessels Act, Section 2, 43 Stat. 1112, 46 U. S. C. 782. Thus, where Congress intends to permit the allowance of interest on judgments against the United States, specific statutory authorization exists. Such enactments "* * * rest within easy Congressional control" (*United States* v. *Nunnally Investment Co.*, 316 U. S. 258, 264) and the necessary statutory authorization may not be presumed from Congressional silence. *Tillson* v. *United States*, 100 U. S. at 46; *United States* v. *North American Co.*, 253 U. S. at 336; *Angarica* v. *Bayard*, 127 U. S. at 260. There is no statutory authorization for the payment or allowance of interest on Customs Court judgments and, accordingly, we submit that interest on such judgments against the United States may not be allowed.

That Customs Court judgments do not bear interest is made abundantly clear by the consistent administrative practice in this regard, acquiesced in by Congress on numerous occasions.

The Customs Court, originally known as the Board of General Appraisers, was created by the Customs Administrative Act of 1890, 26 Stat. 131, as part of "* * * a comprehensive and interrelated scheme of administrative and judicial remedies * * *" (*United States* v. *Nunnally Investment Co.*, 316 U. S. 258, 264) with exclusive jurisdiction in classification and appraisement cases. *Patchogue-Plymouth Mills Corp.* v. *Durning*, 101 F. 2d 41 (C. C. A. 2); *Gottman Co.* v. *Dailey*, 94 F. 2d 85 (C. C. A. 4), certiorari denied, 299 U. S. 566; *Riccomini* v. *United States*, 69 F. 2d 480 (C. C. A. 9).[24] As

[24] The exclusive system thus established replaced cumbersome procedures theretofore available for protesting the appraisal rulings of customs officials. See Act of March 1, 1823, 3 Stat. 735–736; Act of May 28, 1830, 4 Stat. 409; Tariff Act of 1842, 5 Stat. 564; Act of March 3, 1851, 9 Stat. 630; Act of March 3, 1857, 11 Stat. 195; Act of June 30, 1864, 13 Stat. 215; R. S. 2608, 2609, 2611, 2931, 2932, 2945, 3011, 3012; Freund *Administrative Powers over Persons and Property*, pp. 553–560. It also eliminated, in appraisement and classification cases, the device of a suit against a collector of customs for the recovery of excess duties (R. S. 3011) with an assumption by the United States of liability for the judgment upon the issuance of a writ of probable cause (R. S. 989; 28 U. S. C. 842). Even where the United States had thus assumed liability for a judgment against a collector, it was not liable for interest on the judgment in the absence of express statutory authorization. *United States* v. *Sherman*, 98 U. S. 565; *White* v. *Arthur*, 10 Fed. 80 (S. D. N. Y.); *Stephani's Case*, 26 Int. Rev. Rec. 313; cf. *United States* v. *Kales*, 314 U. S. 186, 199–200; *Sage* v. *United States*, 250 U. S. 33, 37. However, final judgment against a collector included interest from the date of collection of the duties until the date of rendition of judgment. See *Cochran* v. *Schell*, 107 U. S. 625; *Huntley*

stated above, the Act of 1890 contained no provision authorizing the allowance of payment of interest on refunds. See 26 Stat. 140.[25] Within a year after the passage of the statute, the Secretary of the Treasury requested an opinion by the Attorney General on the question whether authority existed for the payment of interest upon refunds made in conformity with judgments. The Attorney General ruled that no such authority existed and that such interest could not be paid. 20 Op. A. G. 238. Following this opinion, on August 11, 1891, the Assistant Secretary of the Treasury directed all collectors of customs that "* * * no interest is to be allowed upon refunds made in conformity with judgments obtained in cases of appeal under the act of June 10, 1890." T. D. 11616. Since 1890, the consistent administrative practice has been in conformity with this ruling. See Appendix A, *infra*, pp. 47–48; *Marine* v. *Lyon*, 62 Fed. 153 (C. C. A. 4); T. D. 15050; Customs Regulations, 1892, Art.

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v. *Southern Oregon Sales, Inc.*, 104 F. 2d 153, 154 (C. C. A. 9). The Government's liability for the interest included in the judgment against a collector presented a serious fiscal problem (19 Cong. Rec. 702–708) and Congress sought to reduce this burden by limiting the award of interest against a collector prior to judgment to three per cent. R. S. 3011, as amended by the Act of February 1, 1888, 25 Stat. 6.

[25] The Customs Administrative Act of 1890, *supra*, eliminated even the limited right of an importer to interest prior to judgment, *supra*, note 24, by repealing R. S. 3011 without substituting any equivalent provision. 26 Stat. 131, 141–142; cf. 19 U. S. C. 1513.

935, p. 392; Customs Regulations, 1899, Art. 1477, p. 517; Customs Regulations, 1908, Art. 1084, p. 445; Customs Regulations, 1923, Art. 787, p. 410; Customs Regulations, 1931, Art. 862, pp. 536–537; Customs Regulations, 1937, Art. 861, p. 490; Customs Regulations, 1943, Art. 17.4, p. 327 and Art. 24.36, p. 456, note 6; see *Treat* v. *Farmers' Loan & Trust Co.*, 185 Fed. 760, 764 (C. C. A. 2). During the period between 1890 and the present time, Congress has not authorized the payment of interest on refunds made in conformity with judgments of the Customs Court, although it has from time to time reenacted and, in other ways, amended, the Customs Administrative Act. Act of August 5, 1909, 36 Stat. 103; Act of October 3, 1913, 38 Stat. 191; Act of September 21, 1922, 42 Stat. 973; Act of June 17, 1930, 46 Stat. 739, as amended by the Act of June 25, 1938, 52 Stat. 1086, 19 U. S. C. 1520; Act of June 26, 1934, 48 Stat. 1225.

This consistent administrative construction and practice, based upon an opinion of the Attorney General and acquiesced in by Congress on numerous occasions, conclusively demonstrates that Congress does not intend, and has not authorized, the award or payment of interest on custom duty refunds made in conformity with Customs Court decisions. *United States* v. *Falk*, 204 U. S. 143.[26]

[26] In the *Falk* case, this Court relied upon a consistent administrative construction by the Treasury Department of a section of the Customs Act of 1890, based upon an opinion of the Attorney General and acquiesced in by Congress.

Accordingly, we submit that, even if Section 177 (a) be considered inapplicable to this proceeding, the court below lacked power to award interest on the Customs Court judgments involved, and its action herein, in awarding such interest, is in violation of the applicable Customs Regulations, here, the Regulations of 1937. Appendix B, *infra*, pp. 49–50.

II

THE ACT OF MARCH 3, 1875 IS ENTIRELY INAPPLICABLE IN THE CIRCUMSTANCES OF THIS CASE.

Respondents seek to support the award of interest by the court below by invoking the Act of March 3, 1875, and, indeed, urge, in their cross-petition for a writ of certiorari (No. 96), that the amount of interest awarded by the court below should be increased. It should be noted that the court below did not refer to the Act of March 3, 1875, but sought to justify its award of interest by reasons entirely unrelated to the provisions of that Act. See *supra*, pp. 24–25. It is the Government's view that the Act of 1875 is wholly inapplicable to this case; if it be deemed applicable, however, the Government consents to the granting of the relief requested by the respondents in their cross-petition.

The Act of March 3, 1875, provides that: (1) When a claimant presents a final judgment against the United States to the Comptroller

General for payment, and such claimant is indebted to the United States; (2) it is the duty of the Comptroller General to withhold payment of the judgment, as an offset, against the indebtedness of the claimant to the United States; (3) if the claimant denies his indebtedness to the United States, it is the duty of the Comptroller General to cause suit to be brought on the claimant's indebtedness; and (4) if in such action judgment is rendered against the United States in the whole or part of the amount initially withheld by the Comptroller General, interest may be paid on any balance owed to the claimant from the time of the initial withholding. See *supra*, pp. 3–4.

This statute does not, on its face, and was never intended to, apply to a situation where, as here, the failure to pay a customs refund resulted from the inability of Government officials to determine the person entitled thereto and where that inability resulted from a maze of reorganization, and assignments probably not made in conformity with R. S. 3477 (see, *supra*, note 15, pp. 19–20), followed by dissolution of the corporate claimants. In contrast, the Act of 1875 contemplates only a case involving the refusal by the Government to pay an acknowledged liability to a fully identified claimant for set-off purposes. It "only provides a way of payment and satisfaction if the creditor shall, at the time of the presentation of his judgment, be a debtor of the United States * * *." *United States* v. *Jones*, 119 U. S. 477, 480.

A. *The Act of 1875 applies only when the United States has withheld payment under an assertion of set-off*

The United States, even without specific statutory authority, has the power and right to effect accounting set-offs and adjustments in connection with claims presented to it for payment; it may do so in "the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." *Gratiot* v. *United States,* 15 Pet. 336, 370; *McKnight* v. *United States,* 98 U. S. 179, 186. The Act of 1875 affirmatively requires the Comptroller General to assert, and have adjudicated, any set-offs which the United States may have against a judgment creditor (*Bonnafon* v. *United States,* 14 C. Cls. 484, 489–490; *United States* v. *La Grange Grocery Co.,* 31 F. 2d 297, 298 (N. D. Ga.)) and "* * * prescribes the procedure for enforcing [such] set-off." *United States* v. *Ennis,* 132 Fed. 133, 134 (D. N. J.). The Act compensates the claimant by payment of interest in the event that the Government's assertion of set-off is not upheld.

But the Act applies only where the Government asserts a set-off against the judgment claimant. As indicated by its title, it is "An Act to provide for deducting any debt due to the United States from any judgment recovered against the United

States by such debtor." 18 Stat. 481. Every provision of the statute relates solely to the assertion and litigation of a cross debt. It is the unsuccessful assertion of a set-off by the United States which, under the statute's provisions, withdraws a claim from the prohibition of Section 177 (a). *United States* v. *New York C. & St. L. R. Co.*, 32 Fed. 887, 890–891 (C. C. A. 6).

In every case which we have found in which the Act of 1875 has been cited as authorization for the allowance of interest against the United States, payment had been withheld from the claimant for the purpose of asserting a set-off.[27] No case cited

[27] *United States* v. *LaGrange Grocery Co.*, 31 F. 2d 297, 298 (N. D. Ga.); *United States* v. *New York, C. & St. L. R. Co.*, 32 F. 2d. 887, 888 (C. C. A. 6); *Lloyd-Smith* v. *United States*, 71 C. Cls. 74, certiorari denied, 283 U. S. 836; *Mohawk Condensed Milk Co.* v. *United States*, 70 C. Cls. 671, 672; *Helvetia Milk Condensing Co.* v. *United States*, 74 C. Cls. 142, 150; *Highland Milk Condensing Co.* v. *United States*, 74 C. Cls. 267, 268; *Helvetia Milk Condensing Co.* v. *United States*, 77 C. Cls. 743, 744, certiorari denied, 290 U. S. 671; *Highland Milk Condensing Co.* v. *United States*, 77 C. Cls. 745, 746, certiorari denied, 290 U. S. 671; *American Cyanamid Co.* v. *United States*, 78 C. Cls. 313; *American Potash Co.* v. *United States*, 80 C. Cls. 160, 162; *American Steam Conveyor Corp.* v. *United States*, 81 C. Cls. 151, certiorari denied, 296 U. S. 599; *R. J. Reynolds Tobacco Co.* v. *United States*, 82 C. Cls. 545, 549; *Whitbeck, Receiver* v. *United States*, 77 C. Cls. 309, 332, certiorari denied, 290 U. S. 671; *Aluminum Cooking Utensil Co.* v. *United States*, 90 C. Cls. 187; *Aluminum Co. of America* v. *United States*, 87 C. Cls. 96, 126; *Chicago I. & L. Ry. Co.* v. *United States*, 78 C. Cls. 96, 98; *Stewart & Co.* v. *United States*, 71 C. Cls. 126, 127; *Standard Dredging Co.* v. *United States*, 71 C. Cls. 218, 237; *Converse* v. *United States*, 75 C. Cls. 542; cf. *Aluminum Co. of America* v. *United States*, 90 C. Cls. 173, 183.

by respondents here or in the court below holds that the Act of 1875 permits an award of interest against the Government in the absence of an asserted set-off by the Government at the time of withholding payment.[28]

Moreover, we do not believe that the Act of 1875 authorizes the payment of interest to a judgment claimant unless the cross indebtedness asserted by the United States has been actually litigated. The statute directs the Comptroller General to bring suit on the alleged cross indebtedness and only permits interest "* * * if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld * * *" 31 U. S. C. 227. Although some cases have indicated that the mere assertion of a cross debt by the United States against a judgment claimant suffices to bring the case within the provisions of the Act of 1875 as to awards of interest (cf. *American Potash Co.* v. *United States*, 80 C. Cls. 160), the most recent

[28] In their brief in opposition to the Government's petition (Br. in Opp. 9), respondents placed their chief reliance on *American Potash Co.* v. *United States*, 80 C. Cls. 160, describing it as "squarely in point." It is obviously not in point. There the Court of Claims specifically found that "The Comptroller General withheld payment of the [tax] refund duly allowed by legal authority and stopped payment of the check *on the ground that plaintiff might be indebted to the United States on account of taxes for other years* * * *." *Id.*, at 162 (italics added).

relevant decision refused to permit interest under the statute where an asserted cross indebtedness had not been finally determined, presumably by the judgment of a court. *Richmond F. & P. R. Co.* v. *United States,* 95 C. Cls. 244; cf. *Hines* v. *United States ex rel. Marsh,* 105 F. 2d 85, 88 (App. D. C.); *Richmond, F. & P. R. Co.* v. *McCarl,* 62 F. 2d 203, 208 (App. D. C.), certiorari denied, 288 U. S. 615. However, whether or not the Act of 1875 (insofar as it permits interest to judgment claimants) comes into operation only where the Government's set-off is actually litigated, no case has permitted the payment of interest to a judgment claimant by reason of the statute where, as here, there has not even been an assertion of set-off or cross indebtedness.

Respondents' contention herein amounts to no more than a naked assertion that, since recognized owners of undisputed judgment claims against the United States are permitted by the Act of 1875 to recover interest in a special situation, all judgment claims against the United States bear interest under the same statute without regard to the occasion for the withholding of payment. But the principle of the Government's immunity from awards of interest, embodied in Section 177 (a), applies rigorously (*United States* v. *North American Co.,* 253 U. S. 330, 336) and is only avoided when Congress has expressly waived

such immunity by relevant special statute.[29] *Tillson* v. *United States*, 100 U. S. 43, 46; *Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *Goltra*, 312 U. S. 203, 207. Respondents ask in substance, that the Act of 1875 be rewritten so as to apply to a situation clearly beyond its present scope. We submit that such a modification of the Act may be effected only by Congress, and that where the withholding of payment of a judgment is not the result of the assertion of a set-off, the Act of March 3, 1875, *supra*, pp. 3–4, is not applicable. *New York Central and H. R. R. Co.* v. *United States*, 24 C. Cls. 22.

B. *Respondents do not rely on a judgment within the meaning of the Act of 1875, as amended*

The Act of 1875 provides that when "any final judgment * * * shall be presented * * * for payment, and the plaintiff therein shall be indebted to the United States," the Comptroller General shall withhold an amount sufficient to offset the claimant's debt to the United States. We suggest that the statute contemplates only judgments which can be presented *"for payment"*

[29] As shown above, Congress has specifically provided for the allowance of interest on various types of judgments against the United States (*supra*, pp. 31–32). These specific authorizations leave ample scope for a proper application of the interest provisions of the Act of March 3, 1875.

and which are susceptible of a set-off, and that the Customs Court judgments herein, which merely determined a question of classification, are not judgments of that sort.

As originally enacted, the Act of 1875 referred to either a "final judgment recovered against the United States or other claim duly allowed by legal authority." 18 Stat. 481. In 1933, Congress amended the act by confining its application to final *judgments* as distinguished from *claims* duly allowed by legal authority. Act of March 3, 1933, 47 Stat. 1516, 31 U. S. C. 227; *Whitbeck, Receiver* v. *United States,* 77 C. Cls. 309, 342–343, certiorari denied, 290 U. S. 671. The amendment was intended to relieve the Comptroller General of the duty of litigating set-offs on behalf of the United States against any but judgment claimants, and to limit to such judgment creditors the preferential treatment theretofore afforded to a wider class of claimants when faced by withholding under an assertion of cross debt. S. Rep. No. 1021, 72nd Cong., 2nd Sess., H. Rep. No. 2182, 72nd Cong., 2nd Sess.

Examination of the basis of respondents' claims herein reveals that they do not exclusively rely on the "judgment" of the Customs Court as such, but also on subsequent administrative proceedings. The decision and judgments of the Customs Court did not, of themselves, make respond-

ents judgment creditors within the meaning of the 1875 Act. They sustained a protest on a point of customs classification and directed the Collector of Customs to make "* * * a reliquidation accordingly of the customs entries covering the shipments of rayon yarns" (R. 16). No payment of money was directed by such judgments.[30] If the judgment alone had been presented to the Comptroller General for payment, aside from the other questions involved in this case, payment would rightfully have been refused because administrative steps necessary to the ascertainment of the refunds had not been taken. See Customs Regulations, 1937, Art. 856, p. 489; Art. 861, p. 490; Art 1190 (a), p. 682; and Art. 1201, p. 692, Appendix B, *infra*, pp. 49–52. After judgment, the Collector of Customs must reliquidate the entries in accordance with the decision of the Customs Court. 19 U. S. C. 1515; Customs Regulations, 1937, Art. 856, p. 489. Payment of refunds is not authorized until the amount thereof has been ascertained by reliquidation and certified by the Collector as a "person(s) by law duly

[30] The judgment of the Customs Court is not a money judgment (*United States* v. *Calogera*, T. D. 31729 (S. D. N. Y.); *Treat* v. *Farmers' Loan & Trust Co.*, 185 Fed. 760, 764 (C. C. A. 2); but compare, *United States* v. *Davis*, 54 Fed. 147 (C. C. A. 8)); it is a declaratory decree and a direction to the collector, as the Tariff Acts require, to reliquidate the entry accordingly. *Brooks* v. *Mandel-Witte Co.*, 54 F. 2d 992, 994 (C. C. A. 2).

authorized to incur obligations on behalf of the United States." Customs Regulations, 1937, Art. 1190 (a); Customs Regulations, 1943, Art. 2436, p. 456; 19 U. S. C. 1520. Whatever description may be applied to these functions of the Collector, it is clear that these administrative steps, taken after judgment in the Customs Court and not forming part of such judgment, constitute the basis for payment by the United States.[31]

A Customs Court judgment is therefore not in itself susceptible of presentation for payment or available for set-off within the meaning of the Act of 1875, as amended in 1933. Together with the above described subsequent administrative steps, it is "* * * an award in favor of the importer by competent legal authority" (*Tserioni* v. *United States;* 94 C. Cls. 142, 147, certiorari denied, 314 U. S. 668) and, as such, falls within the category of "claim(s) duly allowed by legal authority" which was deleted from the coverage of the Act of 1875 by the 1933 amendment.

[31] The place of these administrative steps in the chain of events leading to perfection of a claim for a customs duty refund was necessarily recognized by respondents herein. Their complaint alleged that they became entitled to refunds as "* * * the result of said judgments and the reliquidation of the customs entries made pursuant thereto by the Collector * * *" which were "* * * duly certified by the Collector * * * to the proper disbursing officer for payment * * *" (R. 4). Similar allegations were made in the related suits, Nos. 45862 and 45863, in the court below.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and the case remanded with instructions to eliminate the allowance of interest.

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DECEMBER 1946.

APPENDIX A

OFFICE OF THE COMMISSIONER

Address Reply To
Commissioner of Customs

In Reply Refer To
142.52

TREASURY DEPARTMENT
BUREAU OF CUSTOMS
WASHINGTON 25

Nov. 25, 1946.

Honorable JOHN F. SONNETT
Assistant Attorney General
Department of Justice
Washington 25, D. C.

SIR: It is understood that your office is prosecuting an appeal from a judgment of the Court of Claims in a case entitled *New York Rayon Importing Co., Inc.*, and others, v. *The United States* involving the determination of the proper party to receive refunds of customs duties allowed by the Customs Court. It is also understood that the judgment includes an allowance of interest on the amount of such refund.

In this connection your office has requested this Bureau for a statement of general practice relative to the payment of interest in cases where the refunds of duties are directed to be made by the United States Customs Court and such refunds are paid pursuant to the court's decisions. It is not and has not been the practice in the Customs Service, when paying refunds of customs duties pursuant to decisions of the United States Cus-

toms Court, to make any payments of interest on the amounts refunded irrespective of the elapsed time between the date of decision and the date of payment.

Very truly yours,

S/ W. R. JOHNSON.
Commissioner of Customs

APPENDIX B

1. Customs Regulations, 1931:

ART. 1191. *Right to receive refund checks.*—A check issued by a collector to a corporation, which has since ceased doing business, as a refund of duties on merchandise imported in its name, will not be paid to another person or firm claiming the proceeds thereof as the real party in interest, unless and until such person or firm has established by competent evidence that they are entitled to the entire amount of the check, or that they have succeeded to the business or assets of the payee corporation. (p. 736.)

2. Customs Regulations, 1937:

ART. 856. *Reliquidation of entries under decisions of the United States Customs Court.*—Entries which are the subject of such decisions will be reliquidated in harmony with the judgment order thereon at the expiration of 60 days from the date of the decision, or 90 days in the case of merchandise imported into Alaska or the insular possessions of the United States, unless an appeal or petition for a rehearing is filed, except that entries the subject of decisions of the court, which follow a decision of the Court of Customs and Patent Appeals involving the same issue, will be reliquidated immediately upon receipt of orders from the United States Customs Court. (p. 489.)

ART. 861. *Refunds of duties.*—(*a*) Refunds of duties on reliquidation by reason

of any ruling or decision of the Bureau, the United States Customs Court or the United States Court of Customs and Patent Appeals will be made in accordance with chapter XXII.

(*b*) The refunding of moneys in compliance with such decisions is the function of the Secretary of the Treasury, and there is no foundation for a suit against the collector of customs to restrain him from disposal of such moneys.

(*c*) Payments of costs and interest in customs cases upon such refunds is not allowed. (p. 490.)

ART. 1190. *Certification.*—(*a*) The Division of Disbursement shall disburse moneys only upon certification of persons by law duly authorized to incur obligations on behalf of the United States. The function of accountability for improper certification shall be transferred to such persons and no disbursing officer shall be accountable therefor. (p. 682.)

* * * * *

ART. 1201. *Refund of excessive duties, etc.*—(*a*) The authorized refunds of amounts deposited into the Treasury covering duties collected in excess of the amount found due upon the liquidation or reliquidation of an entry, fees, charges, or exactions collected erroneously or in excess of the amount actually due, or fines, penalties, or forfeitures collected which did not accrue or accrued in a lesser amount or which have been mitigated to an amount less than collected or which have been remitted, shall be refunded from the appropriation "Refunds and Drawbacks (Customs)". Refunds of duties collected in Puerto Rico

and refund of duties and other receipts collected in the Virgin Islands will be made from the customs receipts of Puerto Rico or the Virgin Islands, as the case may be.

(*b*) Whenever it is found on liquidation or reliquidation of an entry that a refund is due, a notice of refund customs Form 5269, shall be prepared at the headquarters port in the name of the person to whom the refund is due as determined by paragraph (*c*).

(*c*) Refunds of such excessive duties shall be made by check drawn to the order of the importer of record, that is, the person in whose name the entry was made, or to the order of the actual owner when substituted for the importer of record in accordance with section 485 (d) of the tariff act. The person in whose name a rewarehouse entry is made may, for the purpose of making refunds, be considered the importer of record of the merchandise covered by the rewarehouse entry, provided he has filed a rewarehouse bond and the principal in the original warehouse entry bond does not, in advance of payment of the refund, file a written notice of an adverse claim. (See T. D. 45614.) The check covering the amount due, accompanied by the original notice of refund, shall be delivered or mailed together to the person entitled to receive the same, provided that, in the case of entries made at ports of entry other than headquarters ports, the check and notice shall first be sent to the deputy collector in charge at the port of entry for mailing after noting payment on the proper schedule.

(*d*) In case the nominal consignee has become bankrupt, refunds of duties on merchandise entered in the name of such nomi-

nal consignee for the account of the actual owner should be withheld from payment pending the receipt of claim therefor and establishment of rights thereto, unless the declaration of the ultimate consignee or actual owner has been filed with the collector, under the provisions of section 485 of the tariff act.

U. S. GOVERNMENT PRINTING OFFICE, 1946

FILE COPY

JUN 20 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 94

UNITED STATES,

Petitioner,

vs.

N. Y. RAYON IMPORTING CO., INC. (=2), AND ALFRED L. ROSE, NORMAN S. GOETZ, WALTER MENDELSOHN AND BERNARD D. LANG, AS LIQUIDATING DIRECTORS AND TRUSTEES OF N. Y. RAYON IMPORTING CO., INC. (=2)

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENTS IN OPPOSITION

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SUPREME COURT OF THE UNITED STATES

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No. 94

UNITED STATES,

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N. Y. RAYON IMPORTING CO., INC. (#2), AND ALFRED L. ROSE, NORMAN S. GOETZ, WALTER MENDELSOHN AND BERNARD D. LANG, AS LIQUIDATING DIRECTORS AND TRUSTEES OF N. Y. RAYON IMPORTING CO., INC. (#2)

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinion Below

The opinion of the Court of Claims (R. 21-29) is officially reported in 64 F. Supp. 684.

Jurisdiction

The judgment of the Court of Claims was entered on February 4, 1946 (R. 27) and the petition for certiorari was filed on April 30, 1946. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288 (b).

Question Presented

The question presented is whether the Court of Claims in granting judgment in favor of respondents in an action to recover the amounts determined to be owing by the United States under two judgments of the United States Customs Court entered April 30, 1937 and May 6, 1937, respectively, properly awarded interest to the respondents from a date subsequent to the date of said prior judgments under the provisions of the Act of March 3, 1875, as amended, 31 U. S. C. 227, dealing with interest when a judgment is unpaid.

Question Not Presented

At the outset, we wish to point out that the Government has not presented the question accurately in stating that the issue before this Court is the applicability of Section 177 (a) of the Judicial Code, 28 U. S. C. 284, which deals with interest on original claims against the Government. We have never relied on that statute. The only issue before this Court is the applicability of the Act of March 3, 1875, as amended, 31 U. S. C. 227, which deals with interest on judgments and which, strangely enough, is mentioned by the Government only in a footnote near the end of its brief.

Statute Involved

The Act of March 3, 1875, as amended, 31 U. S. C. 227, dealing with interest when a judgment is unpaid, provides as follows:

> "Sec. 227. Offsets against judgments against United States.—When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comp-

troller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff."

Statement

The facts are not in dispute and were found by the Court of Claims as follows:

Respondent, N. Y. Rayon Importing Co. Inc. (#2) (hereinafter called "Rayon #2") is the successor to two other corporations, N. Y. Rayon Importing Co. Inc. (#1) (hereinafter called "Rayon #1") and Nyrayco Importing & Converting Corporation (hereinafter called "Nyrayco"), which recovered judgments in the United States Customs Court against the United States on April 30, 1937 and May 6, 1937 (R. 16). Respondents, Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn and Bernard D. Lang, are the

liquidating directors and trustees of Rayon #2 (R. 20). As a result of said Customs Court judgments, it was determined that $393,292.46 was owing by the United States (R. 16).

Checks were issued between August 4, 1937 and February 3, 1938 aggregating $393,292.46 (R. 16) but their delivery was withheld on the excuse that respondent Rayon #2 and its predecessor corporations Rayon #1 and Nyrayco had all been dissolved.

Notwithstanding the fact that the New York statutes dealing with dissolved corporations expressly permitted such corporations to sue to collect their assets through their liquidating directors (New York General Corporation Law, § 29) the checks were withheld by the Comptroller General of the United States (R. 17).

In 1938, a formal petition was filed with the General Accounting Office requesting that the checks be delivered but the General Accounting Office refused to deliver the checks either to Rayon #2, or to Rayon #1 or Nyrayco, and instead deposited the proceeds of the checks in the Treasury in the fund entitled "Outstanding Liabilities, 1938" (R. 17).

In a further effort to satisfy the Comptroller General a declaratory judgment was obtained by consent in the New York Supreme Court which adjudicated that Rayon #2 was the owner of the judgments and refunds. The Comptroller General still refused to approve any payment thereof although a copy of the judgment and a new demand were sent (R. 17).

In a still further effort to satisfy the Comptroller General, on February 26, 1943, the attorneys for Rayon #2, Rayon #1 and Nyrayco wrote the Comptroller General again requesting that payment be made to Rayon #2 and suggesting, in the alternative, that the Comptroller General

might make payment to Rayon #1 and Nyrayco and their respective liquidating directors, with the consent of Rayon #2 (R. 17, 18), Rayon #2 being the sole stockholder of Rayon #1 and Nyrayco (R. 14). The Comptroller General nevertheless again refused to make payment (R. 18).

Finally three actions in the Court of Claims were instituted on April 29, 1943 by Rayon #2 and its liquidating directors, by Rayon #1 and its liquidating directors, and by Nyrayco respectively. The actions were consolidated and tried together (R. 20).

Although the Government had had the matter under consideration since 1937, on the trial it offered no evidence of any kind to controvert the evidence (basically documentary) given on behalf of the plaintiffs..

The findings of the Hearing Commissioner were not excepted to by the Government.

In its brief and argument before the Court of Claims, the Government did not dispute the succession by Rayon #2 to all the assets of Rayon #1 and Nyrayco, including the customs refund claims. Moreover the Government conceded its obligation to pay the judgments of $362,482.17 based on the custom refunds of Rayon #1, payment of which the Comptroller General was withholding without color of justification.

As to the judgments based on the claims of Nyrayco aggregating the much smaller sum of $30,809.75, the Government took the technical position that these judgments were void because entered in the Customs Court after Nyrayco's involuntary[1] dissolution for nonpayment of taxes in 1935 (a dissolution which had occurred five years after Nyrayco's transfer of all its assets to Rayon #2).

[1] This objection was not made as to the judgments in favor of Rayon No. 1 since that corporation had been voluntarily dissolved (R. 15).

It is not surprising that the Court of Claims overruled this legally unjustified objection (the propriety of which ruling the Government does not now question), and that it entered judgment in favor of Rayon #2 for the entire amount of the previous judgments, aggregating $393,292.46, with interest. The only surprising thing is that the Court of Claims allowed interest only from April 19, 1941, instead of from 1938 when payment of the judgments was withheld by the Comptroller General.

By the time the judgment in the Court of Claims was entered on February 4, 1946, the Government had had the use of the $393,292.46 paid to it as excessive customs duties for more than seventeen years, the last payments of duties having been made in 1929 (R. 10).

ARGUMENT

Point I

The ruling of the Court of Claims in awarding interest was correct under the authority of the Act of March 3, 1875, as amended, 31 U. S. C. 227 and numerous decided cases.

We do not dispute the principle that the Government is not liable to pay interest on claims against it *in the absence of statutory provision.*

Our contention is that express statutory provision for interest *on an unpaid judgment,* where payment is withheld by the Comptroller General, is found in the provisions of the Act of March 3, 1875, as amended, 31 U. S. C. 227.

The Government virtually ignores this statute, discussing it only in a footnote (Brief p. 13), and instead sets up a straw man by proceeding to a lengthy discussion of Section 177(a) of the Judicial Code (28 U. S. C. 284), dealing with interest on *original* claims against the government.

(a)

Section 177(a) of the Judicial Code Applies Only to Suits on Original Claims; Actions Based on Pre-existing Judgments Against the Government Are Controlled by the Act of March 3, 1875, as Amended, 31 U. S. C. 227.

As stated, *supra*, page 2 we have never claimed that our situation fell within Section 177(a) of the Judicial Code, 28 U. S. C. 284, since this action in the Court of Claims was based on pre-existing judgments.

The prohibitions against the granting of interest and exceptions thereto contained in Section 177(a) of the Judicial Code refer only to *original claims* which have not previously been reduced to judgment.[2] Where a valid judgment had previously been entered against the Government, the Act of March 3, 1875, as amended, 31 U. S. C. 227, provides for interest on the judgment if it is found that payment is withheld improperly by the Comptroller General.

In *Stewart & Co.* v. *United States*, 71 C. Cls. 126 (1930) the Court of Claims in allowing interest *after* a judgment under the Act of March 3, 1875, 31 U. S. C. 227, held Section 177 (a) of the Judicial Code, 28 U. S. C. 284, to be inapplicable, writing (p. 131):

> "The words 'no interest shall be allowed on any claims up to the date of rendition of judgment by the Court of Claims' we think were intended to apply to suits on the original claim."

If Section 177 (a) of the Judicial Code applies to actions on pre-existing judgments, 31 U. S. C. 227 is meaningless.

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[2] In *Tillson* v. *United States*, 100 U. S. 43; *United States* v. *Verdier*, 164 U. S. 213, 218; and *United States* v. *North American Co.*, cited by the Government (pp. 12, 15), interest was not sought on a judgment against the United States but on the original claim.

(b)

Under the Provisions of 31 U. S. C. 227, Interest is Allowable on Unpaid Judgments, the Payment of Which is Wrongfully Withheld by the Comptroller General.

Under 31 U. S. C. 227, where payment of a judgment is withheld by the Comptroller General in the exercise of his statutory duty because he believes the United States owns a cross-indebtedness, interest must be paid from the date of withholding, if it is ultimately found that no such cross-indebtedness exists.

Thus, under the statute interest runs against the United States on judgments allowed by legal authority, regardless of the Comptroller General's good faith and reasonableness in withholding payment (*American Steam Conveyor Corp. v. United States*, 10 F. Supp. at 577).

The policy behind the Act of March 3, 1875, 31 U. S. C. 227 was well stated in *United States v. New York, C. & St. L. R. Co.*, 32 F. (2d) 887, 890 (CCA 6th, 1929), where, in allowing interest on a sum of money owing to the plaintiff, payment of which had been disapproved in good faith by the Secretary of the Treasury, Moorman, C. J., wrote:

> "This allowance of interest which the statute makes was obviously intended as compensation to the claimant for the unauthorized withholding of the payment of his claim."

The same policy was stated in *American Potash Co. v. United States*, 80 C. Cls. 160, 166, 8 F. Supp. 717, 719 (1934), where Littleton, J., wrote:

> "The whole purpose of the Act was to compensate a claimant by way of interest on an amount which had been allowed by legal authority for the time during which it was wrongfully withheld from him."

Congress has clearly indicated a policy that once a judgment of a competent court has been entered against the United States, a plaintiff should not be further denied his money without the accrual of interest.

A fortiori, if the Comptroller General withholds payment of the amount of any final judgment recovered against the United States *without even claiming that a cross-debt is owing by the plaintiff to the United States*, interest on the amount of the final judgment should be paid for the period payment has been withheld.

American Potash Co. v. *United States*, 80 C. Cls. 160, 8 F. Supp. 717 (1934), is squarely in point. In this case the Commissioner of Internal Revenue had determined that the plaintiff was entitled to a refund of $105,432.89 and check in this amount, dated May 17, 1930, was mailed to the plaintiff. On June 17, 1930, the Comptroller General of the United States stopped payment on the check. The Comptroller General withheld payment on the ground that the plaintiff *might* be indebted to the United States on account of taxes for other years and continued to withhold payment until June 12, 1931. Having determined that no cross-indebtedness existed on this latter date, the Comptroller General authorized payment of the refund to the plaintiff in the above sum and the check which had been withheld was delivered to the plaintiff. Plaintiff then sued in the Court of Claims for interest from the date of the check to the date on which the Comptroller General finally approved of payment and was awarded judgment under the provisions of the Act of March 3, 1875, 31 U. S. C. 227.

One of the arguments urged by the United States in the *American Potash* case in opposition to the claim for interest was that since there had been no formal claim of cross-indebtedness and no adjudication of that point, the delay being due simply to a reasonable investigation of the Comptroller General as to the possibility of such indebtedness, the

case did not fall within the literal language of the Act of March 3, 1875. This argument was repudiated by the Court, Littleton, J., writing (80 C. Cls. 160, 165-166, 8 F. Supp. 717, 219):

> "In our opinion the plain provisions and obvious purpose of the Act of 1875 negative this contention * * *. *The whole purpose of the Act was to compensate a claimant by way of interest on an amount which had been allowed by legal authority for the time during which it was wrongfully withheld from him, if it should be ultimately determined that he was not otherwise indebted to the United States.* The case at bar clearly comes within these provisions, for the amount here involved was withheld in the hope that some indebtedness of the plaintiff might be found against which it could be applied. *In our opinion, this is even a stronger case for the allowance of interest than one where a definite indebtedness is claimed by the Government to exist in its favor and it is prosecuted to final judgment.*"

The decision in the *American Potash* case was never appealed by the Government and the policy enunciated therein was apparently acquiesced in by the Government.

Yet the Government in the instant case has urged (Brief p. 13) that 31 U. S. C. 227 does not apply here because no set-off was asserted by the United States. In the Court of Claims, the Government made the same argument, urging that respondents had not proved the existence of what it claimed were essential conditions and writing in its brief below:

> "The Act of March 3, 1875, as amended by the Act of March 3, 1933, by its terms prescribes the following conditions which must be met before interest is recoverable under it: (1) the claimant must have a final judgment against defendant and present it to the Comptroller General for payment; (2) the Comptroller General must withhold payment of the judgment by

way of set-off of some claimed indebtedness of the claimant to defendant; (3) the claimed indebtedness of the claimant to defendant must be reduced to suit; (4) in such suit judgment must be rendered against defendant either in the whole or part of the amount withheld by the Comptroller; i. e., the set-off must be adjudicated invalid in whole or in part."

It is undisputed in the instant case that final judgments against the Government were entered in the United States Customs Court, that they were presented for payment to the Comptroller General, and that the Comptroller General withheld payment erroneously. Surely, if, as the Government admits, interest must be paid on judgments where payment is withheld by the Comptroller General in the justifiable but erroneous belief that there is a set-off, interest should *a fortiori* be paid where the withholding is found to be without justification and where there is not even a claim of set-off.

Other cases in addition to the *American Potash* case have allowed interest under 31 U. S. C. 227, even though all these conditions were not present. (*American Steam Conveyor Corp.* v. *United States*, 81 C. Cls. 151, 10 F. Supp. 571, cert. denied 296 U. S. 599; *United States* v. *La Grange Grocery Co.*, 31 F. 2nd 297 (D. C. Ga.).

Thus, in *American Steam Conveyor Corp.* v. *United States*, 81 C. Cls. 151, 10 Fed. Supp. 571, cert. denied 296 U. S. 599, the Commissioner of Internal Revenue determined that the plaintiff was entitled to a tax refund of $13,544.49 and certified the refund to the Comptroller for payment. The Comptroller General ordered payment of this entire sum of $13,544.49 withheld because of an alleged off-set of $112.58, which although disputed by the plaintiff was finally deducted from the refund. The difference of $13,431.91 was eventually paid by the Comptroller General, but without interest. The plaintiff then instituted action

to recover interest on the $13,431.91 for the period withheld. Judgment was rendered for the plaintiff under 31 U. S. C. 227, Green J., writing (81 C. Cls. at 164, 10 F. Supp. at 577):

> "We find nothing in this case which takes it out from under the provisions of this statute allowing interest on the overpayment from the time it was allowed until paid. *It is urged in argument on behalf of the defendant that the Comptroller General acted within a reasonable time. For the purposes of the argument this may be conceded* although the government's claim was a specific and liquidated one. *But the plaintiff was deprived of the use of a sum of money, which at all times after the allowance of the claim, was admitted to be due and owing to it. It is only fair and just that it should receive compensation* therefor and if the act be construed not to provide for compensation under such circumstances it becomes of little benefit to the parties which the act was intended to relieve. We think that under a reasonable construction of the act the plaintiff is entitled to recover interest on the amount withheld from the time the refund was allowed up to the time it was paid."

In *United States* v. *La Grange Grocery Co.*, 31 F. (2d) 297 (D. C. Ga.) the General Accounting Office refused to pay a tax refund that was concededly due to the La Grange Grocery Co. because of an alleged offset and caused an action to be instituted to recover the amount alleged to be due the United States. The defendant counter-claimed for the amount due on the tax refund. Pending the action the Government abandoned its claim and sent a check for the refund due. The Court awarded judgment to the defendant for the interest upon the amount improperly withheld under 31 U. S. C. 227 notwithstanding the fact that no judgment was entered against the Government dismissing its claim.

(c)

Judgments of the Customs Court Are Judgments Within the Meaning of 31 U. S. C. 227

There is no reason why in applying the provisions of the Act of March 3, 1875, 31 U. S. C. 227, a judgment of a Customs Court should be treated any differently from a judgment of any other court of the United States.

In *David L. Moss Co.* v. *United States*, 103 F. (2d) 395, 397, the Court referred to the functions of the Customs Court and wrote:

> "The court is a court of law, and it is granted full power to relieve against illegality in the assessments or collection of duties 19 U. S. C. A. §§ 1515, 1518. If relief may not be had before it against illegal actions under the flexible tariff provisions relief may not be had anywhere for its jurisdiction in such matters is exclusive."

In *Brooks* v. *Mandel-Witte Co.*, 54 F. (2d) 992, 994, the Court wrote:

> "A final order or decree of the Customs Court, sustaining or overruling a protest, is in the form of a declaratory judgment and a direction to the Collector, as the tariff acts require, to reliquidate the entry accordingly."[3]

---

[3] The Government suggests that the Act of March 3, 1875 applies only to "money judgments" and contends that the judgments of the Customs Court were declaratory judgments (brief, p. 13). There is no such technical distinction in the statute; moreover, the judgments of the Customs Court were in effect money judgments. The provision contained in the judgment of that Court for reliquidation of the customs entries is simply a direction that a mere ministerial function (towit, mathematical computation of the amount due) be performed, similar to the computation of costs and interest made by the Clerk of the Court in an action at law.

Just as interest may be awarded under 31 U. S. C. 227 on judgments secured against the United States on account of illegal collection of taxes, payments of which judgments were improperly withheld by the Comptroller General (e.g.: *Helvetia Milk Condensing Co.* v. *United States*, 77 C. Cls. 743, 3 F. Supp. 662, cert. denied 290 U. S. 670) so too, interest is allowable against the United States on judgments for the refund of illegally collected customs duties, payment of which has been improperly withheld by the Comptroller General.

(d)

The Customs Regulations and Cases Cited in a Footnote by the Government are Irrelevant.

Reference is made in a footnote in the Government's petition (page 13) to certain regulations of the Treasury Department providing that interest is not allowed on customs claims.

These customs regulations are wholly irrelevant since they pertain to original customs claims, not to interest after judgment is entered—a matter governed by statute. Respondents do not claim interest from the period 1925 to 1929 when the customs duties were paid under protest and the claims filed, but claim interest only from 1938 when the claims were merged in judgments and payment withheld by the Comptroller. Moreover, the Court of Claims allowed interest only from 1941.

The cases cited in the same footnote, *Stephani's* case, 26 Int. Rev. Rec. 313, 314, and *White* v. *Brown*, 10 Fed. 80, are likewise not in point, for the Act of March 3, 1875 (31 U. S. C. 227) was not cited in those cases and was inapplicable since the judgments there involved were (a) not

judgments against the United States but against individual Collectors and (b) payment of the judgments had not been withheld by the Comptroller General (or, as the statute then provided, by the Secretary of the Treasury). Moreover, in *United States ex rel. McLeod* v. *Sherman*, 98 U. S. 565, the issue arose prior to the enactment of the Act of March 3, 1875.

(c)

A Writ of Certiorari Should be Denied to the Government.

The Government's petition presents no novel question.[4] Respondents believe that no public interest will be served by a review of the decision below which has been shown to be in accord with all prior decisions. The provisions of the Act of March 3, 1875, as amended (31 U. S. C. 227) have been interpreted by the courts on numerous occasions and the cases cited in this brief granting interest on an unpaid judgment under this statute are only a few of the many cases where interest has been allowed under this statute.

Conclusion

The decision of the court below is correct; indeed, it is too favorable to the Government (see respondents' cross petition for certiorari). The statute in question has been frequently and consistently construed contrary to the Government's contentions and no question of general interest

[4] The Government has cited another recent decision of the Court of Claims (*Thayer-West Point Hotel Co.* v. *United States*, 74 F. Supp. 636) where interest was granted and in which certiorari is being sought. That case does not bear the faintest resemblance to the instant case since it did not involve the allowance of interest on a judgment, the question involved here.

is presented. It is, therefore, respectfully submitted that the Government's petition for a writ of certiorari should be denied.

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FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1946

No. 94.

UNITED STATES,

Petitioner,

against

N. Y. RAYON IMPORTING CO., INC. (=2), and ALFRED L. ROSE, WALTER MENDELSOHN and BERNARD D. LANG, as Liquidating Directors and Trustees of N. Y. Rayon Importing Co., Inc. (=2),

Respondents.

No. 96.

N. Y. RAYON IMPORTING CO., INC. (=2), and ALFRED L. ROSE, WALTER MENDELSOHN and BERNARD D. LANG, as Liquidating Directors and Trustees of N. Y. Rayon Importing Co., Inc. (=2),

Petitioners,

against

UNITED STATES,

Respondent.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENTS-PETITIONERS.

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UNITED STATES,

Respondent.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENTS-PETITIONERS.

Opinion Below.

The opinion of the Court of Claims (R. 21-29) is reported in 105 C. Cls. 606.

Jurisdiction.

The judgment of the Court of Claims was entered on February 4, 1946 (R. 27). A petition for certiorari was filed on April 30, 1946 by the United States and a cross-petition for certiorari was filed on May 1, 1946 by N. Y. Rayon Importing Co., Inc. (#2) and its liquidating directors (hereinafter referred to as the plaintiffs). The petitions were granted on October 14, 1946. Jurisdiction to issue the writs is conferred by Section 3(b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288(b).

Questions Presented.

1. The question presented on the writ of the United States as petitioner is whether the Court of Claims has the power to award interest where payment of a judgment of the United States Customs Court has been unjustifiably withheld by the Comptroller General.

2. The question presented on the cross-writ of the plaintiffs is the correct date from which interest should have been awarded.

The Court of Claims allowed interest from April 19, 1941, although the Customs Court judgments had been entered in 1937.

The Government asserts that the Court of Claims has no power to award interest on unpaid preexisting judgments against the United States, no matter how long payment may be unjustifiably withheld. The Government concedes only one exception—where the

withholding results from a claim of cross-indebtedness which is ultimately litigated and adjudicated to be invalid (Act of March 3, 1875, 31 U. S. C. 227).

We urge that interest should have been awarded at least from 1938 when the Comptroller General withheld payment of the Customs Court judgments, rather than from April 19, 1941 the date selected by the Court of Claims.

Statement.

Plaintiff, N. Y. Rayon Importing Co. Inc. (#2) (hereinafter called Rayon #2) is the successor and sole stockholder of two other corporations, N. Y. Rayon Importing Co. Inc. (#1) and Nyrayco Importing & Converting Corporation (hereinafter respectively called "Rayon #1" and "Nyrayco"), which in 1937 recovered judgments in the United States Customs Court against the United States for excessive customs duties (R. 16).

The withholding of payment of these judgments by the Comptroller General ultimately required suits in the Court of Claims which, on February 4, 1946, resulted in judgment in favor of Rayon #2 and its liquidating directors for the amount of the Customs Court judgments, with interest from April 19, 1941 (R. 27).

The Government has acquiesced in the judgment, except as to the allowance of interest, and the writs of certiorari relate only to this question.

The facts are not in dispute and were found by the Court of Claims as follows:

Status of Parties.

Plaintiff's predecessors, Rayon #1 and Nyrayco, were engaged in the business of importing rayon yarn, and between 1925 and 1929 were forced to pay large sums of money for customs duties which had been unlawfully assessed. Between 1925 and 1929 these corporations duly filed protests against said assessments, thereby instituting actions in the United States Customs Court (R. 10).

On March 1, 1930 plaintiff, Rayon #2, was incorporated as part of a corporate reorganization by which it succeeded to all the assets and liabilities of Rayon #1, Nyrayco and two other corporations, all of which corporations were equitably owned by the same interests as continued to own Rayon #2 (R. 10, 14, 15). As part of the reorganization, Rayon #1 was voluntarily dissolved under the provisions of Section 105 of the New York Stock Corporation Law (R. 14, 15), which expressly provides that the corporate existence of a dissolved corporation continues for the purpose of winding up its affairs and maintaining suits.

Nyrayco also discontinued its business activities on March 1, 1930, and was eventually involuntarily dissolved on December 16, 1935 by proclamation, pursuant to Section 203-a of the New York Tax Law, for non-payment of franchise taxes (R. 16). At the time of its dissolution, Section 29 of the New York General Corporation Law likewise provided that a corporation upon dissolution "for any cause and whether voluntary or involuntary" continued in existence for the purpose of collecting its assets and winding up its affairs and might sue in its corporate name.

Prior to this dissolution all Nyrayco's assets had, by the 1930 reorganization, become the property of Rayon #2 (R. 10, 14, 15).

Plaintiff, Rayon #2 continued in business until January 9, 1931, when it was voluntarily dissolved under Section 105 of the New York Stock Corporation Law (R. 15).

The Customs Court Judgments.

On April 30, 1937 and May 6, 1937, two judgments were entered in the United States Customs Court, determining that there were owing from the United States on account of customs duties paid by Rayon #1 the sum of $362,482.17, and on customs duties paid by Nyrayco the sum of $30,809.75 (R. 16).

Comptroller General Withholds Delivery of Treasury Checks Drawn to Pay Judgments.

Checks were drawn on the Treasury of the United States between August 4, 1937 and February 3, 1938, aggregating $393,292.46 (R. 16), but their delivery was withheld by the Comptroller General on the ground that Rayon #1 and Nyrayco had been dissolved (R. 17). Payment was refused notwithstanding the fact that the New York statutes dealing with dissolved corporations expressly permitted such corporations to collect their assets through their liquidating directors (New York General Corporation Law, Section 29).

In 1938 a formal petition was filed with the General Accounting Office, requesting that the checks be delivered, but the Comptroller General refused to deliver the checks either to Rayon #2 or to Rayon #1 and Nyrayco (R. 17).

After futile negotiations, in an attempt to satisfy the Comptroller General, a declaratory judgment was obtained by consent in the New York Supreme Court

on January 24, 1942, which adjudicated that Rayon #2 was the owner of the Customs Court judgments and refunds. Although a copy of the judgment and a new demand were sent to the Comptroller General, payment continued to be withheld (R. 17).

In a final effort to satisfy the Comptroller General a letter was written on February 26, 1943 on behalf of Rayon #2, Rayon #1 and Nyrayco, requesting that payment be made to Rayon #2, but offering, if the Comptroller General preferred, to have Rayon #2 consent that payment be made to Rayon #1 and Nyrayco and their liquidating directors (R. 17-18). The Comptroller General continued to refuse to make any payment to anyone (R. 18).

Actions in the Court of Claims.

As a last resort actions were instituted in the Court of Claims on April 29, 1943 by Rayon #2, Rayon #1 and Nyrayco to compel payment of the Customs Court judgments. The actions were consolidated and tried together, the three corporations being united in interest and represented by the same attorneys (R. 20).

Despite the fact that payment had been withheld since 1938, at the trial the Government offered no evidence, and made no effort to controvert plaintiffs' evidence, which was basically documentary. No exception was taken to the findings of the Hearing Commissioner.

In the Court of Claims, the Government did not question the succession in 1930 by Rayon #2 to the assets of Rayon #1 and Nyrayco (including the rights to the customs refunds) (R. 14).

The Government conceded its obligation to pay the judgments for $362,482.17 based on the customs claims of Rayon #1 (R. 23), although payment of these had been withheld for eight years.

The Government, however, altogether denied the power of the Court of Claims to allow interest on these unpaid judgments, and also disputed the validity of the smaller judgment, amounting to $30,809.75, based on the customs claims of Nyrayco (R. 23-24).

As to the Nyrayco judgments, the Government did not deny that Nyrayco had been compelled to pay such excess duties (R. 22). The Government however took the position that the Customs Court judgments in favor of Nyrayco were void because entered after Nyrayco's *involuntary*[1] dissolution in 1935 under the N. Y. Tax Law § 203a for nonpayment of franchise taxes (a dissolution which had occurred five years after Nyrayco's transfer of all its assets to Rayon #2 [R. 14]).

The Court of Claims overruled this legally unjustified objection (R. 23-25) (the propriety of which ruling the Government does not question), entered judgment in favor of Rayon #2 for the entire amount of the Customs Court judgments in favor of both Rayon #1 and Nyrayco, aggregating $393,292.46, and allowed interest on the judgments from April 19, 1941 (R. 27).

April 19, 1941 was the date when, according to the Court of Claims, by an amendment to the New York

[1] No objection was made as to the judgments in favor of Rayon #1, since that corporation had been voluntarily dissolved and no New York tax question ever existed (R. 15).

Tax Law §203a, "all question of the capacity of plaintiffs to maintain suit was removed" (R. 26; N. Y. Laws 1941, c. 590).

The Court of Claims appears to have overlooked the fact that no question as to the capacity of Rayon #1 and Rayon #2 ever was or could have been raised. While the amendment to the N. Y. Tax Law might have had some bearing on the Nyrayco judgment of $30,809.75, it did not have any conceivable relation to the much larger judgments on Rayon #1's claims amounting to $362,482.17.

By the time the judgment in the Court of Claims was entered on February 4, 1946, the Government had had the use of plaintiffs' $393,292.46 for more than seventeen years since the collection of the customs duties, *and for more than eight years since the Customs Court judgments* (R. 10, 16).

Specification of Errors to Be Urged.

1. The Court of Claims erred as to the time from which interest was to run by erroneously fixing April 19, 1941 instead of the dates on which the checks were drawn.

2. The Court of Claims erred in failing to fix as the starting dates for allowance of interest the dates on which checks were drawn, payment of which was withheld by the Comptroller General.

Summary of Argument.

I. The Court of Claims was justified in allowing interest on the judgments of the Customs Court. Both the Act of March 3, 1875 as amended (31 U. S. C. 227)

and Section 177 of the Judicial Code (28 U. S. C. 284) by clear implication indicate a Congressional intention to allow interest after judgment.

II. Under the Act of March 3, 1875 (31 U. S. C. 227) interest should have been allowed at least from the time payment of the Customs Court judgments was withheld in 1938. April 19, 1941, the date of a New York Tax Law amendment, selected by the Court of Claims, had no conceivable relation to the $362,482.17 judgments of Rayon #1 (which was not dissolved under the Tax Law), and was irrelevant as to interest on the $30,809.75 judgments in favor of Nyrayco.

Statutes Involved.

(1) The *Act of March 3, 1875*, as amended by the Act of March 3, 1933 c. 213, Title II §13, 31 U. S. C. 227, dealing with interest when a judgment is unpaid, provides as follows:

> "When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States,

or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff."

(2) *Section 177 of the Judicial Code*, 28 U. S. C. 284, which relates to interest on claims prior to judgment, reads as follows:

"(a) No interest shall be allowed on any claim *up to the time of the rendition of judgment** by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).

"(b) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from

* All italics in this brief are ours, except as otherwise stated.

the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is hereby authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor."

Argument.

POINT I.

The Court of Claims was justified in allowing interest on the judgments of the Customs Court.

The Court of Claims realized that merely to have required payment of 1937 judgments in 1946, eight years after rendition, without awarding interest, would not have done full justice.

The Government cites cases holding that, in the absence of contract or statute, interest does not usually accrue on claims against the Government *prior to the entry of judgment*.

But the reason for the rule,—governmental immunity from suit—does not apply to interest accruing *after* judgment duly entered against the United States in a court to whose jurisdiction it has consented.

This Court has held that even in the absence of statute "just compensation" under the Constitution requires the payment of interest where property taken by the Government in condemnation is not paid for at the time of taking (*United States* v. *Richards*, 255 U. S. 163; *Seaboard Airline Ry. Co.* v. *United States*, 261 U. S. 299).

Here "the defendant had the benefit of the money, and the plaintiff was without it. Interest must be added if we are to make the plaintiff whole" (Cf. Cardozo, J., in *Prager* v. *N. J. Fidelity & Plate Glass Ins. Co.*, 245 N. Y. 1, 5-6).

The policy of allowing interest on unpaid *judgments*, where payment is withheld by the Comptroller General, is implicit in the statutes, particularly the Act of March 3, 1875 (31 U. S. C. 227), and has been repeatedly applied by the Court of Claims.

A.

That interest runs after judgment is implicit in Section 177 of the Judicial Code; its restrictions relate only to original claims prior to judgment.

The Government relies on that portion of Section 177 (a) of the Judicial Code (quoted in full, *supra*, pp. 10-11), which provides that, except in the case of Internal Revenue tax refund claims,

> "No interest shall be allowed on any claim *up to the time of the rendition of judgment* by the Court of Claims unless upon a contract expressly stipulating for the payment of interest, except * * *"

The prohibition of Section 177 (a) of the Judicial Code plainly refers only to interest on *original claims prior* to the rendition of judgment. This is clear not only from the words "up to the time of the rendition of judgment" but also from the exception expressed in the section, which specifically allows interest on Internal Revenue tax refund claims prior to any judgment from the date of payment of the excessive taxes.

The prohibition of interest "up to the time of the rendition of judgment", by necessary implication imports the accrual of interest after the rendition of judgment, and thus accords with our view of the law.

To construe Section 177 (a) of the Judicial Code as prohibiting interest upon preexisting judgments, would create unnecessary conflict with the Act of March 3, 1875 (amended in 1933, 31 U. S. C. 227), which expressly refers to interest on judgments.

Under the Act of March 3, 1875, the courts have repeatedly granted interest on preexisting judgments (pp. 22-24, 27, *infra*), and have recognized that the prohibition of Section 177 (a) of the Judicial Code applies only to *original* claims *prior to judgment*.

In *Stewart & Co.* v. *United States*, 71 C. Cls. 126 (1930) the Court of Claims in allowing interest *after* a judgment, held Section 177 (a) of the Judicial Code to be inapplicable, writing (p. 151):

> "The words 'no interest shall be allowed on any claims up to the date of rendition of judgment by the Court of Claims' we think were intended to apply to suits on the original claim."

B.

The Act of March 3, 1875 as amended (31 U. S. C. 227), enunciates the rule that interest is allowable on judgments payment of which is erroneously withheld by the Comptroller General.

The Act of March 3, 1875 as amended, 31 U. S. C. 227 (quoted in full, *supra*, pp. 9-10), provides that where a judgment is rendered against the United States and the Comptroller General believes that a cross-indebtedness is owing to the United States, he shall withhold payment of the judgment and litigate the cross-indebtedness, but that interest must nevertheless be paid by the United States from the date of the withholding to the extent that it is ultimately adjudged that no such cross-indebtedness existed.

Thus, under the express language of the statute, interest runs against the United States on unpaid judgments, even though the erroneous withholding of payment is effected by the Comptroller General, not only in good faith, but in accordance with a statutory duty (*American Steam Conveyor Corp.* v. *United States*, 10 F. Supp. at 577).

1. *The policy of the Act of March 3, 1875 is to allow interest where payment of a judgment is unjustifiably withheld.*

As well stated in *American Potash Co.* v. *United States*, 80 C. Cls. 160, 166 (1934), by Littleton, *J.*, as to the Act of March 3, 1875:

"The whole purpose of the Act was to com-

> pensate a claimant by way of interest on an amount which had been allowed by legal authority for the time during which it was wrongfully withheld from him * * *"

The plain spirit and purpose of the Act of March 3, 1875, was stated in *United States* v. *New York, C. & St. L. R. Co.*, 32 F. (2d) 887, 890 (C. C. A. 6th, 1929), by Moorman, *C. J.*:

> "This allowance of interest which the statute makes was obviously intended as compensation to the claimant for the unauthorized withholding of the payment of his claim."

Yet the Government here contends that, though under the statute interest accrues on judgments if the withholding results from an erroneous belief in the existence of a cross-indebtedness, interest does not accrue *when payment of the judgment is withheld for any other reason—or for no reason at all.*

No policy is advanced for a differentiation which would make the right to interest on a judgment depend upon the reason the Comptroller General elects to assign for withholding payment.

We submit that "that is not the way to read the will of Congress, particularly when expressed by a statute * * *" "a hospitable scope must be given to Congressional purpose" (*United States* v. *Hutcheson*, 312 U. S. at 235).

> "The policy as well as the letter of the law is a guide to decision." (Douglas, *J.*, in *Markham* v. *Cabell*, 326 U. S. at 409.)

2. *Broad application is given to a policy indicated by Congress even when such policy is expressed in a statute which refers in terms only to a specific situation.*

Mr. Justice Holmes on circuit in *Johnson* v. *United States*, 163 Fed. 30, 32, enunciated the principle in language which has been repeatedly quoted by this Court:

> "We recognize that courts have been disinclined to extend statutes modifying the common law beyond the direct operation of the words used, and that at times this disinclination has been carried very far. But it seems to us that there may be statutes that need a different treatment. *A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.* The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

The Congressional major premise implicit in the Act of March 3, 1873 (as well as in Section 177 (a) of the Judicial Code) is that interest runs after the entry

of judgment. This major premise should be given effect even though not expressed in meticulous language.

The same principle of statutory construction has been applied by this Court in a number of situations, including Governmental immunity from suit, to which the question of immunity from interest is closely analogous.

In *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, this Court held that even though a statute did not in terms waive the immunity from suit of a wholly-owned Government corporation, Congress had indicated a general policy to this effect by waiving such immunity in statutes applicable to other governmental corporations. The Court wrote (pp. 389 and 394):

> "Has Congress endowed Regional with immunity in the circumstances which enveloped its creation? It is not a textual problem; for Congress has not expressed its will in words. Congress may not even have had any consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute from which flow the right and responsibilities of Regional, but in a series of statutes utilizing corporations for governmental purposes and drawing significance from dominant contemporaneous opinion regarding the immunity of governmental agencies from suit" (p. 389) * * *
>
> "To give Regional an immunity denied to more than two score corporations, each designed for a purpose of government not relevantly different

from that which occasioned the creation of Regional, is to impute to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none. "A fair judgment of the statute in its entire setting relieves us from making such an *imputation of caprice*" (p. 394).

So here, to hold that interest runs on judgments only when payment is withheld because of a claim of cross-indebtedness, and not when erroneously withheld for other reasons, is to impute to Congress a desire for incoherence and for drastic legal differentiation where policy justifies none.

In *United States* v. *Hutcheson*, 312 U. S. 219, this Court held that the Norris-LaGuardia Act, restricting injunctions in labor dispute cases in the federal courts, established a policy changing the previously settled rule that the Sherman Law applied to labor unions. Mr. Justice Frankfurter wrote (p. 235):

> "Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out *the importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking. Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 391, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit * * * [quoting from *Johnson* v. *United States*, 163 F. 30, 32]."

In *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342, although no statute expressly terminated the common law rule abating tort actions on the death of the plaintiff, this Court held that the policy of the Merchant Marine Act of 1920 indicated such a policy in relation to actions brought by the beneficiary in a death action. Cardozo, *J.*, wrote (pp. 350-1):

> "There are times when uncertain words are to be wrought into consistency and unity with *a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system.* 'The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.'"

To avoid injustice or to give effect to the implicit legislative purpose, this Court has not hesitated to restrict or broaden the application of statutes.

In *Sorrells* v. *United States*, 287 U. S. 435, this Court read an exception into the plain language of the statute to cover the case of entrapment by Government officials. Hughes, *C. J.*, wrote (pp. 446, 448):

> "Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice have frequently been condemned. (citing cases) * * *
>
> "We are not forced by the letter to do violence to the spirit and purpose of the statute."

In *United States* v. *American Trucking Associations*, 310 U. S. 534 (1940), Mr. Justice Reed stated (pp. 543-4) as to construction of statutes:

> "Frequently, however, even when the plain meaning did not produce absurd results but merely an

unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

This principle was enunciated by this Court as early as 1845 when in *United States* v. *Freeman*, 44 U. S. 557, it was held that the Act of 1818 covering brevet "officers of the army" should be deemed to include such officers in the marine corps, because there was a general policy of uniform treatment. Mr. Justice Wayne wrote (p. 565):

> "These citations are but different illustrations of the rule, that the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the Legislature proceeded, from the end in view, or the purpose which was designed—the limitation of the rule being, that to extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the law-maker proceeded, and not only within a like reason."

Accord: *Silver* v. *Ladd*, 74 U. S. 219 ("single man" held to include "widow").

The Act of March 3, 1875 clearly proceeds on the policy that interest shall be allowed on unpaid judgments where payment is erroneously withheld.

Surely, if, as the Government admits, interest accrues on judgments where payment is withheld by the Comptroller General in the justifiable but erroneous belief that there is a set-off, it would be anomalous to hold that interest does not run where the withholding is without even such justification.

In *United States* v. *Farenholt*, 206 U. S. 226, aff'g. 41 C. Cls. 517, this Court wrote as to a contention by the Government which would have had a similarly anomalous result (p. 229):

> "* * * In other words, the government contends it was the purpose of Congress to give the inferior officer the better pay. The Assistant Attorney General ventures on no explanation of this anomaly, but insists upon the written word. A court is not always confined to the written word. Construction sometimes is to be exercised as well as interpretation. And 'construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter, of the text.'"

C.

Interest has been repeatedly granted in conformity with the policy underlying the Act of March 3, 1875, even when not within its letter.

The Government has urged that the Act of March 3, 1875 only applies where four supposed "conditions" coincide, writing in its brief below:

> "The Act of March 3, 1875, as amended by the Act of March 3, 1933, by its terms prescribes the following conditions which must be met before interest is recoverable under it: (1) the claimant must have a final judgment against defendant and present it to the Comptroller General for payment; (2) the Comptroller General must withhold payment of the judgment by way of set-off of some claimed indebtedness of the claimant to

> defendant; (3) the claimed indebtedness of the claimant to defendant must be reduced to suit; (4) in such suit judgment must be rendered against defendant either in the whole or part of the amount withheld by the Comptroller; i. e., the set-off must be adjudicated invalid in whole or in part."

The provisions as to cross-indebtedness in the Act of March 3, 1875 are neither phrased nor intended as *conditions* to the allowance of interest on judgments; they simply prescribe the procedure to be followed by the Comptroller General in order to justify his withholding immediate payment of such judgments.

The courts have accordingly allowed interest where all the last two or three supposed "conditions" were absent.

American Potash Co. v. *United States*, 80 C. Cls. 160, 8 F. Supp. 717 (1934), is squarely in point. In that case it had been determined that the plaintiff was entitled to a tax refund of $105,432.89 and a check in this amount, dated May 17, 1930, was mailed to the plaintiff. The Comptroller General withheld payment in order to investigate the possibility of indebtedness to the United States on account of taxes for other years and, without making a definite claim or instituting any suit, continued to withhold payment until June 12, 1931 when he concluded that no cross-indebtedness existed and allowed payment. Plaintiff thereupon sued in the Court of Claims for interest from the date of the check to the date of payment, and was awarded judgment under the provisions of the Act of March 3, 1875.

The chief argument urged by the Government in the *American Potash* case in opposition to the claim for interest was that since there had been no definite claim of cross-indebtedness, no suit and no adjudication of that point, the delay being due simply to a reasonable investigation by the Comptroller General, the case did not fall within the literal language of the Act of March 3, 1875. This argument was repudiated by the Court, Littleton, *J.*; writing (80 C. Cls. 160, 165-166, 8 F. Supp. 717, 719):

> "In our opinion the plain provisions and obvious purpose of the Act of 1875 negative this contention. * * * *The whole purpose of the Act was to compensate a claimant by way of interest on an amount which had been allowed by legal authority for the time during which it was wrongfully withheld from him,* if it should be ultimately determined that he was not otherwise indebted to the United States. * * * *In our opinion, this is even a stronger case for the allowance of interest than one where a definite indebtedness is claimed by the Government to exist in its favor and is prosecuted to final judgment.*"

The decision in the *American Potash* case was never appealed by the Government and the policy enunciated therein was apparently acquiesced in by the Government.

In *American Steam Conveyor Corp.* v. *United States*, 81 C. Cls. 151, cert. denied 296 U. S. 599, it had been determined that the plaintiff was entitled to a tax refund of $13,544.49. The Comptroller General ordered the entire sum withheld because of an alleged offset of $112.58, which plaintiff disputed. The difference of $13,431.91 was eventually

paid, without suit or adjudication, by the Comptroller General. The plaintiff then instituted action to recover interest on the $13,431.91 for the period withheld. Judgment was rendered for the plaintiff under the Act of March 3, 1875, notwithstanding the fact that all the supposed conditions of the statute were not present, Green, *J.*, writing (81 C. Cls. at 164):

> "We find nothing in this case which takes it out from under the provisions of this statute allowing interest on the overpayment from the time it was allowed until paid. *It is urged in argument on behalf of the defendant that the Comptroller General acted within a reasonable time. For the purposes of the argument this may be conceded* although the government's claim was a specific and liquidated one. *But the plaintiff was deprived of the use of a sum of money, which at all times after the allowance of the claim, was admitted to be due and owing to it. It is only fair and just that it should receive compensation* therefor and if the act be construed not to provide for compensation under such circumstances it becomes of little benefit to the parties which the act was intended to relieve."

In *United States* v. *La Grange Grocery Co.*, 31 F. (2d) 297 (D. C. Ga.) the General Accounting Office refused to pay a tax refund that was concededly due to the La Grange Grocery Co. because of an alleged offset and caused an action to be instituted to recover the amount alleged to be due the United States. The defendant counter-claimed for the amount due on the tax refund. Pending the action the Government

abandoned its claim and sent a check for the refund due. The Court awarded judgment to the defendant for the interest upon the amount improperly withheld under 31 U. S. C. 227 notwithstanding the fact that no judgment had been entered adjudicating the invalidity of the offset.

D.

Judgments of the Customs Court are judgments within the meaning of the Act of March 3, 1875.

There is no reason why in applying the provisions of the Act of March 3, 1875, a judgment of a Customs Court should be treated any differently from a judgment of any other court of the United States.

In *David L. Moss Co. Inc.* v. *United States*, 103 F. (2d) 395, 397, the Court referred to the functions of the Customs Court and wrote:

> "The court is a court of law, and it is granted full power to relieve against illegality in the assessments or collection of duties 19 U. S. C. A. §§ 1515, 1518. * * * its jurisdiction in such matters is exclusive."

In *Brooks* v. *Mandel-Witte Co. Inc.*, 54 F. (2d) 992, 994, the Court wrote:

> "A final order or decree of the Customs Court, sustaining or overruling a protest, is in the form of a declaratory judgment and a direction to the Collector, as the tariff acts require, to reliquidate the entry accordingly."

In its petition for certiorari the Government suggested that the Act of March 3, 1875 applies only to "money judgments" and not to the declaratory judg-

ments of the Customs Court. No such distinction is made in the statute.

Moreover, the judgments of the Customs Court were in effect money judgments. The provision contained in a judgment of the Customs Court for reliquidation of the customs entries is a direction that a mere ministerial function (to wit, mathematical computation of the amount due) be performed by the Collector of Customs, similar to the computation of costs made by the Clerk of the Court in an action at law.

The Customs Court entered its judgments in 1937 and the duty of the Government to pay such judgments cannot be questioned. As payment was withheld for eight years after the judgments, and as the Government had the use of plaintiffs' money for seventeen years, the Court of Claims was empowered, and to do justice was obliged, to award interest.

POINT II.

Interest should have been allowed from the time when payment of the Customs Court judgments was withheld, not later than 1938.

The exact amount due was determined when the customs duties were reliquidated pursuant to the judgments of the Customs Court dated April 30, 1937 and May 6, 1937. Refund checks were drawn on dates from August 4, 1937 to February 3, 1938 (R. 16, 7-8).

In 1938 the Comptroller General refused to permit delivery of the checks (R. 16, 17), and after years of fruitless negotiations with the General Accounting Office, plaintiffs were forced to institute these actions to secure a second judgment in the Court of Claims.

A.

Interest runs from the date payment of a judgment is withheld.

The provisions of the Act of March 3, 1875, 31 U. S. C. 227, are clear that where interest on a judgment is to be awarded against the United States, it shall be "from the time it [payment of the prior judgment] has been withheld from the plaintiff."

American Potash Co. v. *U. S.*, 80 C. Cls. 160 (1934), held that under the above section, interest should run from the date of the issuance of the checks, payment of which was later stopped by the Comptroller General.

Numerous other cases under the Act of March 3, 1875, *e. g.*, *United States* v. *New York, C. & St. L. R. Co.*, 32 F. (2d) 887 (C. C. A. 6th); *United States* v. *La Grange Grocery Co.*, 31 F. (2d) 297 (N. D. Ga.); *Colorado Condensed Milk Co.* v. *United States*, 70 C. Cls. 671; *American Steam Conveyor Corp.* v. *United States*, 81 C. Cls. 151, cert. denied 296 U. S. 599; *Helvetia Milk Condensing Co.* v. *United States*, 77 C. Cls. 743, cert. denied 290 U. S. 671, have held that where the Act applies, interest runs from the time payment of the amount due by the United States has been withheld from the plaintiff.

We have found no authority to the contrary.

Under the *American Potash Co.* case, interest should run here from the dates of the various checks drawn in 1937 and 1938 in payment of the judgments, the delivery of which was withheld (R. 16, 7-8).

B.

The date of April 19, 1941 had no relevancy to the question of interest on the judgments of Rayon #1 for $362,482.71.

April 19, 1941, the date selected by the Court of Claims as the date from which interest was to run, was the date when the Governor of New York approved an amendment to Section 203a of the New York Tax Law (N. Y. Laws, 1941, c. 590), removing all possible question whether corporations previously *involuntarily* dissolved under the New York Tax Law for non-payment of franchise taxes had the right to maintain suits (R. 26).

The Court of Claims in its discussion of interest apparently failed to discriminate between the much larger judgments of Rayon #1 (whose validity even the Government never impugned) and the relatively small Nyrayco judgment of $30,809.75.

The Tax Law amendment was totally irrelevant to the Customs Court judgments for $362,482.71 in favor of Rayon #1, for no question as to capacity to sue was ever raised or has ever existed in relation to Rayon #1 and its successor, Rayon #2. These corporations were *not dissolved under the Tax Law* but were voluntarily dissolved in accordance with Section 105 of the New York Stock Corporation Law (R. 15).

The right of *voluntarily* dissolved New York corporations to maintain suit to collect their assets has never been disputed (New York Stock Corporation Law, Sec. 105, Sub. 8).

In fact, the Government never questioned the

validity of the Customs Court judgments entered on the customs claims of Rayon #1, and in its brief in the Court of Claims the Government not only conceded that payment must be made of the sum of $362,482.71, but also that there was no objection to having judgment run in favor of Rayon #2, the successor in interest of Rayon #1.

There is reference in the Court of Claims opinion to "the maze of reorganizations and transfers" (R. 25). But this statement is unsupported by the record or the findings, and not relevant to the question of interest. There was but one reorganization, as part of which there was one transfer of all assets by Rayon #1 and by Nyrayco, to Rayon #2, the successor corporation (R. 10, 14).

Moreover even where a complicated reorganization situation has existed interest has been allowed (*Aluminum Company of America* v. *United States*, 87 C. Cls. 96, 97).

Certainly, the April 19, 1941 amendment to the Tax Law had not the remotest relation to the Government's obligation to pay the Customs Court judgments in favor of Rayon #1 amounting to $362,482.71, and interest should have been allowed, at least on this amount, from 1938 when the General Accounting Office withheld payment.

C.

The date of April 19, 1941 had no proper relation to the question of interest on the judgments of Nyrayco for $30,809.75.

Even as to the $30,809.75 involved in the Nyrayco Customs Court judgments there was no legal basis for delaying the running of interest to April 19, 1941.

The Court of Claims has held valid the Customs Court judgments of 1937 (R. 23-25), and the Government has now acquiesced in this decision by paying the principal amount.

Assuming that up to April 19, 1941 the Comptroller General might mistakenly have had some doubt as to the validity of the Nyrayco judgment, that afforded no basis for disallowing interest. Under the Act of March 3, 1875, even where the Comptroller General withholds payment because he reasonably believes there is a cross-indebtedness, if he turns out to be in error, interest must be paid from the date of withholding. A misconception may explain the withholding but it does not suspend the accrual of interest.

As the Government has now recognized the validity of the Nyrayco judgment, discussion is not needed to show its validity. We merely summarize the legal situation to indicate how unjustified was the Comptroller General's conduct.

(1)

The Nyrayco judgments were not subject to attack in view of the Government's failure prior to their entry to raise any objection based on Nyrayco's dissolution.

Nyrayco had instituted suit in the United States Customs Court on its claims years prior to its dissolution. It had assigned all its assets, including these claims, to Rayon #2, in 1930, as part of the corporate reorganization, long prior to its dissolution (R. 10, 14).

Nyrayco's dissolution in 1935 was a matter of public record. Yet the Government never raised the question until years after the Customs Court judgments in favor of Nyrayco had been entered and after checks in payment for such judgments had been drawn in Nyrayco's name.

It is well settled that a defense that a plaintiff is not a corporation must be raised by affirmative plea prior to judgment, and that a judgment cannot be collaterally attacked on this ground.

> "Having failed to do so [to raise the defense in the trial court that the plaintiff was a dissolved corporation], the judgment rendered against him in the name of the defendant in error [the corporation] was a valid and binding judgment. * * *. The judgment in favor of the defendant in error was *res judicata* of all the defenses which were or could have been interposed by the plaintiff in error [the defendant] including the capacity of the defendant in error to maintain its suit. (Citing cases.)" (*Commercial Loan and Trust Co.* v. *Mallers*, 242 Ill. 50 at 53.)

Accord:

United States v. *Insurance Cos.*, 22 Wall. (89 U. S.) 99, 101;
Commission v. *Havemeyer*, 296 U. S. 506, 519;
Morse Arms Mfg. Co. v. *United States*, 16 C. Cls. 296;
Basch v. *United States*, 52 C. Cls. 134, 142;
Philippine Sugar Estates Development Co. v. *United States*, 39 C. Cls. 225, 237;
Hebrew Congregation, etc. v. *United States*, 6 C. Cls. 241, 245;
Concordia Savings and Aid Ass'n. v. *Read*, 93 N. Y. 474.
See also: *Pyrogravure Co.* v. *Staber*, 30 Misc. (N. Y.) 658;
New York Rules of Civil Practice, Rule 93, Subdivision 2.

Plainly, therefore, the Government's belated attack on the judgments in the name of Nyrayco was technically without merit.

(2)

Under New York law, Nyrayco at all times had capacity to sue.

The fact that in 1937, when the judgments were finally entered in the Customs Court, Nyrayco had been dissolved by proclamation under the New York Tax Law for non-payment of franchise taxes, did not in any way affect the validity of the Customs Court judgments, which actually belonged to Rayon #2.

The amendment to the Tax Law of April 18, 1941 merely clarified what had previously been law.

In 1937, when the Customs Court judgments were entered, Sec. 203-a of the Tax Law, providing for the involuntary dissolution of corporations failing to pay franchise taxes, did not state whether or not suits could be maintained by such dissolved corporations.

However, Sec. 29 of the New York General Corporation Law, which was in effect at the time of the dissolution of Nyrayco, and at all times since, read as follows:

> "Upon the dissolution of a corporation *for any cause and whether voluntary or involuntary* its corporate existence shall continue for the purpose of paying, satisfying and discharging any existing liabilities or obligations, collecting and distributing its assets, and doing all other acts required to adjust and wind up its business and affairs, and it may sue and be sued in its corporate name. * * *"

The authorities (including the U. S. Customs Court) both prior to 1937 and thereafter held that suit to collect its assets might be maintained by a corporation dissolved under the Tax Law.

The Supreme Court of New York in *Vestal Products Co., Inc.* v. *Manufacturers Trust Co.*, 60 N. Y. Supp. (2d) 183 (1935), wrote:

> "This action is brought by a corporation dissolved on December 16, 1929, pursuant to Section 203-a of the Tax Law for non-payment of franchise taxes. The defendant moves to dismiss the complaint on the ground that the plaintiff has no capacity to sue and also asks alternative relief. * * *

"In 1932, Section 29 of the General Corporation Law was amended to provide that 'upon the dissolution of a corporation for any cause, and whether voluntary or involuntary, its corporate existence shall continue for the purpose of * * * collecting and distributing its assets * * * and it may sue and be sued in its corporate name'. The defendant argues that this section has no application in view of the fact that section 6 of the General Corporation Law provides that if there be in any other corporate law a provision conflicting with any provision of the General Corporation Law or of the Stock Corporation Law, the provisions of such other corporate law shall prevail. The court is of the opinion that section 6 does not apply here, there being no conflict between the provisions of section 203-a of the Tax Law and Section 29 of the General Corporation Law, *either in its 1929 or 1932 form* [italics the court's].

"The motion to dismiss for lack of capacity to sue is accordingly denied. * * *"

Accord:

Klytia Corp. v. *United States*, 72 T. D. 1124 (U. S. Customs Court 1937);

Douglas v. *Perlstein*, 170 Misc. (N. Y.) 561 (1939);

London Lightinwares Corp. v. *Norge Realty Corp.*, N. Y. Law Journal, April 23, 1938, p. 1968, Col. 6 (Sup. Ct.);

Marford Direct Mailing Co. Inc. v. *Socony Vacuum Oil Co., Inc.*, N. Y. Law Journal, December 8, 1938, p. 2027, Col. 2 (Sup. Ct.).

In 1939, some years after the entry of the judgments of the Customs Court, one of the four intermediate appellate courts of New York suggested, in *Matter of*

Eisenstadt, Inc. v. *Heffernan*, 256 App. Div. 488, that Section 29 of the General Corporation Law did not apply to corporations dissolved for non-payment of franchise taxes under Section 203-a of the Tax Law. That court, while not holding that such corporations were wholly dead, felt that the Tax Law was intended to penalize them. That case was affirmed, without opinion, by the Court of Appeals, 283 N. Y. 578, but as the respondent had urged a number of independent grounds for affirmance, and there was no opinion in the Court of Appeals, it is impossible to know on what ground the affirmance was ordered.

To remove the doubts raised by the *Eisenstadt* case, in *1940* the next session of the *New York Legislature*, on the written recommendation of the Deputy Secretary of State of New York in charge of the division of corporations (R. 25), promptly passed a clarifying law, expressly providing that Section 29 of the General Corporation Law applied to corporations dissolved under the Tax Law, *thus approving the interpretation given by the earlier New York cases* (N. Y. Laws, 1940, c. 82).

To avoid any question that this applied to corporations previously dissolved, the Legislature on April 19, 1941, adopted a further amendment to the Tax Law, making it clear that Section 29 of the General Corporation Law applied to any corporation "heretofore or hereafter dissolved under this section" (N. Y. Laws, 1941, c. 590).

The Court of Claims accordingly held (R. 24, 25) that at the time of the entry of the judgment in favor of Nyrayco, the New York law permitted such a corporation to sue and that this has continued to be the New York law.

That being so, interest should have been allowed from the time when payment of the judgments was withheld.

In any event, whatever doubts the Comptroller General might have had prior to April 19, 1941 with respect to the Nyrayco judgment, there was no basis for refusing to pay the Customs Court judgments of Rayon #1, whose validity the Government never even questioned.

CONCLUSION.

It is respectfully submitted that interest should be allowed from the dates of the refund checks of 1937 and 1938, under the provisions of the Act of March 3, 1875, 31 U. S. C. 227, and that the determination of the Court of Claims should be modified accordingly.

Respectfully submitted,

JOSEPH M. PROSKAUER,
Counsel for Respondents-Petitioners.

NORMAN S. GOETZ,
EUGENE EISENMANN,
ALBERT L. SOLODAR,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1946

No. 94.

UNITED STATES,

Petitioner,

—against—

N. Y. RAYON IMPORTING CO., INC. (#2), and ALFRED L. ROSE, WALTER MENDELSOHN and BERNARD D. LANG, as Liquidating Directors and Trustees of N. Y. Rayon Importing Co., Inc. (#2),

Respondents.

No. 96.

N. Y. RAYON IMPORTING CO., INC. (#2), and ALFRED L. ROSE, WALTER MENDELSOHN and BERNARD D. LANG, as Liquidating Directors and Trustees of N. Y. Rayon Importing Co., Inc. (#2),

Petitioners,

—against—

UNITED STATES,

Respondent.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR RESPONDENTS-PETITIONERS.

JOSEPH M. PROSKAUER,
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ALBERT L. SOLODAR,
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THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

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UNITED STATES,

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—against—

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Petitioners;

—against—

UNITED STATES,

Respondent.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR RESPONDENTS-PETITIONERS.

The Government's brief (p. 36) concedes that if the Act of March 3, 1875 be deemed applicable "the Government consents to the granting of the relief requested by the respondents in their cross-petition." Accordingly, the only question remaining is that raised by the Government's petition—does interest run on the judgments here involved payment of which was improperly withheld by the Comptroller General?

I.

The Comptroller General's excuse for non-payment.

A.

The Government's brief is largely a detailed mass of irrelevancies designed to create an unjustified atmosphere of complex conflicting claims.*

The findings below establish that in 1930, by the simplest form of corporate reorganization, Rayon #2 was incorporated, acquired all of the assets and assumed the liabilities of Rayon #1 and Nyrayco, and became their sole stockholder (R. 14, 15). This reorganization involved no change in the basic beneficial ownership (R. 15).

The Government's suggestion that the Comptroller General could have disregarded altogether the transfer of assets to Rayon #2, in view of the Revised Statutes: Section 3477 (31 U. S. Code 203) is not only unsound (those provisions being inapplicable to a successor in a corporate reorganization†), and con-

* The Government's brief repeatedly mentions that Société Pour Nouveaux Placements de Capitaux was impleaded in the Court of Claims actions and that other persons were cited by the Government. It omits to point out that the impleader of Société Pour Nouveaux Placements de Capitaux was on the Government's motion, that Société expressly disclaimed any claim (R. 6), and that the other persons were also unnecessarily cited by the Government as they neither had nor made any claim against the United States (R. 16, 21).

† *Seaboard Airline Ry. Co.* v. *United States*, 256 U. S. 655; *Kingan & Co.* v. *United States*, 71 C. Cls. 19; *Kawneer Company* v. *United States*, 100 C. Cls. 523; *Novo Trading Corp.* v. *Commissioner*, 113 F. (2d) 320; *Monarch Mills* v. *Jones*, 56 F. (2d) 180; *Romberg* v. *United States*, 40 F. Supp. 621. The Customs Regulations, 1931, Art. 1191 (quoted in Appendix B, p. 49 of the Government's brief) recognized the right to a refund check of parties that "have succeeded to the business or assets of the payee corporation".

trary to the Comptroller General's own practice (Decisions of the Comptroller General, 9 Comp. Gen. 72), but is wholly irrelevant. If the Government could disregard the transfer to Rayon #2, what excuse was there for not paying Rayon #1 and Nyrayco in whose names the judgments stood?

Rayon #2 was sole stockholder of Rayon #1 and Nyrayco and expressed willingness to have payment made either to it or to those corporations (R. 15, R. 17-18). Dissolved corporations in New York continue in existence for the purpose of collection of assets (N. Y. Gen. Corp. L. Sec. 29). Thus, the Government could with perfect safety have delivered the checks drawn to the order of Rayon #1 and Nyrayco.

The Comptroller General refused to pay, even after a consent judgment had been entered in New York on January 22, 1942 in an action in which all interested persons were parties* (R. 17).

The Government says that the consent judgment was not entered in an adversary suit. Surely that is immaterial. If there were no adversaries the consent judgment was ample warrant for payment.

After the consent judgment of January 1942 the Comptroller General had no conceivable excuse for holding up payment of the judgments.

---

* The Government's brief is in error where it states that only the corporations were parties to this judgment. The parties included all the directors of the three corporations, the only parties on whose behalf any claim was ever made.

B.

The Government is driven to the position that "even if it be assumed that his actions were unreasonable" (p. 27) the Comptroller General could disregard the judgments of the Customs Court for an indefinite period, without obligation to make due compensation by the payment of interest.

Under the circumstances, the Court of Claims was thoroughly justified in holding that interest should run.* Such an award was not a penalty but the making of just compensation for money unlawfully exacted and withheld.

II.

Interest runs on judgments against the Government.

Basically, the Government contends that no matter what the situation, it may hide behind the doctrine of sovereign immunity, and, without being liable for interest, withhold payment of judgments as long as it chooses.

Congress has made it clear that such is not its present policy.

* The Government never questioned the jurisdiction of the Court of Claims to entertain these actions (28 U. S. C. 250, see *Tscrioni v. United States*, 94 C. Cls. 142). The jurisdiction of the Court of Claims to allow interest on judgments under the Act of March 3, 1875 and other statutes is well settled (*Benedict v. United States*, 66 C. Cls. 437; *Helvetia Milk Condensing Co. v. United States*, 77 C. Cls. 743; *Stewart v. United States*, 71 C. Cls. 126).

By statute after statute it has waived sovereign immunity, and by now has provided that the Government may be subjected to judgment in its own courts in almost every situation where a private corporation might be sued, even where liability is claimed on the basis of the negligence of its agents (Federal Tort Claims Act, Pub. L. 601, 79th Cong., 2nd Session).

The Congressional intention that interest shall be allowed on unpaid judgments duly entered against the United States is plain from the very statutes cited in the Government's brief:

1. The Tucker Act, Act of March 3, 1887, 28 U. S. C. 765, provides for interest on judgments rendered against the Government in the District Courts of the United States.

2. The Suits in Admiralty Act, 46 U. S. C. 743, provides for interest on decrees rendered against the United States for injuries caused by ships owned or operated by the United States or by government corporations.

3. The Public Vessels Act, 46 U. S. C. 782, provides for interest on judgments rendered for damage caused by a public vessel of the United States.

4. The Court of Claims Act, Section 177 of the Judicial Code, 28 U. S. C. 284, provides that interest is payable before and after judgment on Internal Revenue Tax Claims, and by plain implication, after judgment in the case of other claims (See *Stewart & Co. v. United States*, 71 C. Cls. 126, 131).

5. The Act of March 3, 1875, 31 U. S. C. 227, provides for withholding payment of a judgment where

there is a cross claim on behalf of the Government, but even then requires the payment of interest on the judgment to the extent that the cross claim is ultimately found to be without foundation:

6. By the recently adopted Federal Tort Claims Act, Act of August 2, 1946, Section 411, (Pub. L. 601, 79th Cong., 2nd Sess.) the Government not only subjects itself to liability for personal or property damage committed by its employees, in the same manner as if it were a private corporation, but expressly prescribes that interest shall run on judgments entered against it in such cases.

Surely, when Congress has provided in practically every conceivable situation (including tort claims) that interest should run on judgments rendered against the Government, it would be in outing caprice to assume that it intended that the Comptroller General could, without the obligation to pay interest, disregard judgments of the Customs Court involving repayment of the taxpayer's own money.

The situation is in all substantial respects like that in *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, where this Court held that although the statute there involved did not expressly provide for a waiver of immunity from suit, Congress by other statutes applicable to other corporations had indicated a general policy to waive immunity in the case of governmental corporations.

So here, Congress by numerous statutes has indicated a general policy to allow interest on unpaid judgments lawfully entered against the Government.

III.

Interest runs on Customs Court judgments where payment is withheld.

a. Customs Regulations.

The Government's brief cites various Customs Regulations relating to the payment of customs refund claims. None of these regulations has anything to do with the question of interest *after judgment* entered in the Customs Court. So far as they involve interest, they relate simply to the allowance of interest on "refunds" for the period *prior* to judgment. There is no mention of interest after judgment because the regulations contemplate that after the entry of judgment prompt reliquidation and payment will be made.*

b. Legal Effect of Customs Court Judgments.

Wholly without merit is the contention that a judgment of the Customs Court should not carry interest

* Appendix A to the Government's brief, the letter from the Commissioner of Customs to the Assistant Attorney General prepared pending this appeal, is both incompetent and irrelevant. It states that the *Customs Service* does not pay interest on refunds between the date of a Customs Court decision and the date of payment. The Customs Service would not be expected to pay interest on the judgments since the Customs Regulations provide for prompt reliquidation within a specified time, whereupon the Collector of Customs certifies the amount to the Treasury for payment,—all of which was done here (R. 16). It is the withholding by the Comptroller General after the Customs Service has done its duty that starts interest running. We do not claim interest from the date of judgment, but, in accordance with the Act of March 3, 1875, from the date when payment of the judgment "has been withheld" by the Comptroller General which, in a situation analogous to ours, has been held to be the date when the withheld checks were issued (*American Potash Co.* v. *United States*, 80 C. Cls. 160).

because fixing the exact dollar amount requires reliquidation by the Collector of Customs pursuant to the judgment. We are not asking interest prior to reliquidation.

Reliquidation is essentially part of the Customs Court procedure—a purely ministerial act of elementary arithmetic, analogous to the computation of costs by the clerk in a common law court.

Congress has not limited interest to common law money judgments but has allowed it on decrees in equity and admiralty, as the statutes cited above (pp. 5-6) clearly show.

Nor does the Act of March 3, 1875, as amended, confine interest to common law judgments. The language is "when *any final judgment* recovered against the United States *duly allowed by legal authority* shall be presented to the Comptroller General for payment".

The Customs Court is a court of law (*David L. Moss Co. Inc.* v. *United States*, 103 F. (2d) 395, 397, 19 U. S. C. 1518) under the statute its determinations are final (19 U. S. C. 1515) and the documents entered upon its decisions are formally entitled "judgments"; they are held to be final judgments (*Brooks* v. *Mandel Witte Co. Inc.*, 54 F. (2d) 992, 994).

The Government took no exception to the findings of the Court of Claims referring to the Customs Court determinations as "judgments" (R. 16).

Even where no judgment of any court was involved, this Court has held that a statute allowing interest on

"judgments" should be construed to allow interest on an administrative determination equivalent to a judgment.

In *National Bank of the Commonwealth* v. *Mechanics' National Bank of Trenton*, 94 U. S. 437, 438, the plaintiff had proved claims upon the insolvency of a national bank to the satisfaction of the Comptroller of the Currency, and its claims had been allowed. The plaintiff claimed interest from the date the claims were allowed, pursuant to Section 996 of the Revised Statutes, page 18, which provided that "judgments" in the District and Circuit Courts of the United States should bear interest. In opposition it was urged that no "judgment" had ever been entered in any court on plaintiffs' claims. This Court nevertheless unanimously allowed interest, writing, per Swayne, *J.* (p. 438):

> "If these claims had been put in judgment, whether in a court of the United States or in a state court of that State, the result as to interest upon the judgment would have been the same. It was unnecessary to reduce them to judgment, because they were proved to the satisfaction of the comptroller. After they were so proved, they were of the same efficacy as judgments, and occupied the same legal ground. Hence, they are within the equity, if not the letter, of these statutes, and bear interest as judgments would have done."

Ours is an *a fortiori* case, for here a legally authorized court of the United States entered formal final judgments (from which no appeal was taken by the United States) which were presented for payment

to the Comptroller General, and on which the Comptroller General withheld payment for more than eight years.

c. The Government's Authorities.

The Government has not cited a single case holding that interest does not run on a Customs Court judgment on which payment has been withheld by the Comptroller General. The Government's authorities hold merely that interest does not accrue on customs refunds *prior to the date of final judgment.**

The position of the Government, resting on technicalities, is an attempt to extend the obsolescent doctrine of sovereign immunity, contrary to the plain equities of the situation and to the policy expressed by Congress in various statutes.

---

* Practically all the cases cited by the Government relate to the old practice by which an action was brought and a personal judgment obtained against the Collector of Customs, which the Government could assume by certificate of probable cause. Under that practice the Government paid interest on the refund up to the date of final judgment on appeal (*Cochrane* v. *Schell*, 107 U. S. 625 (which overruled *White* v. *Arthur*, 10 Fed. 80). In 1888 Congress reduced such interest to 3% prior to judgment (25 Stat. 6). Senator Hale, in urging the adoption of this statute because the payment of interest by the Government prior to judgment was exceptional, expressed the general Congressional understanding that interest did accrue against the Government after judgment (19 Cong. Rec. 702): "The rule generally is that the Government does not pay interest *until after judgment.*"

CONCLUSION.

Interest should be allowed from the dates of the refund checks of 1937 and 1938, and the determination of the Court of Claims should be modified accordingly.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1185 - 96

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL.,
Petitioners,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND SUPPORTING BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1185

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL.,

Petitioners,

vs.

THE UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review that portion of the judgment of the Court of Claims rendered February 4, 1946 (not yet reported), which fixed April 19, 1941 as the date from which 6% interest was allowed to the petitioners on two prior unpaid judgments against the United States entered in the United States Customs Court on April 30, 1937 and May 6, 1937.

Jurisdiction

The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925.

Summary Statement of the Matter Involved

Petitioner, N. Y. Rayon Importing Co., Inc. (#2) (hereinafter called "Rayon #2"), is the successor to two other corporations, N. Y. Rayon Importing Co. Inc. (#1) (hereinafter called "Rayon #1") and Nyrayco Importing & Converting Corporation (hereinafter called "Nyrayco"), which recovered judgments in the United States Customs Court against the United States on April 30, 1937 and May 6, 1937 (R. 16). Petitioners, Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn and Bernard D. Lang, are the liquidating directors and trustees of Rayon #2 (R. 20). As a result of said judgments, it was determined that $393,292.46 was owing by the United States (R. 16).

Checks were issued between August 4, 1937 and February 3, 1938 aggregating $393,292.46 (R. 16), but the Comptroller General of the United States refused to authorize delivery of the checks either to the petitioners or to their predecessor corporations or their liquidating trustees (R. 17, 18).

On April 29, 1943, an action was instituted against the United States in the Court of Claims (R. 20) and judgment therein was entered in favor of the petitioners in the principal amount of $393,292.46 with interest. Although petitioners in their brief before the Court of Claims asked that the interest be awarded from the dates of the respective checks, the Court of Claims awarded interest from April 19, 1941, the date of a New York statute dealing with capacity of an involuntarily dissolved corporation to sue.

Question Presented

The question presented is whether interest should have been granted from the date of the original issuance of the checks, the delivery of which was withheld by the Comptroller General, rather than from a later date.

Statute Involved

The Act of March 3, 1875, 31 U. S. C. 227, dealing with interest when a judgment is unpaid, provides as follows:

> "Sec. 227. Offsets against judgments against United States.—When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refused to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff."

Facts

The facts are not in dispute and were found by the Court of Claims as follows:

Rayon #1 and Nyrayco were engaged in the business of importing rayon yarn and between 1925 and 1929 paid large sums of money for customs duties which had been unlawfully assessed on rayon yarn imported by them. Thereafter, these corporations duly filed protests against said assessments, thereby instituting actions in the United States Customs Court (R. 10).

On March 1, 1930 petitioner, Rayon #2 was incorporated and as part of a corporate reorganization succeeded to all the assets and liabilities of Rayon #1 and Nyrayco (R. 10, 14). At the same time, Rayon #1 was voluntarily dissolved under the provisions of Section 105 of the New York Stock Corporation Law (R. 14, 15), which expressly provided that its corporate existence continue for the purpose of winding up its affairs and that suit could be maintained in the name of the dissolved corporation.

Nyrayco also discontinued its business activities in March, 1930, and was eventually involuntarily dissolved on December 16, 1935 by proclamation pursuant to the New York Tax Law for non-payment of franchise taxes (R. 16). At the time of its dissolution, Section 29 of the New York General Corporation Law likewise provided that a corporation involuntarily dissolved continued in existence for the purpose of collecting its assets and winding up its affairs and might sue in its corporate name.

Petitioner, Rayon #2 continued in business until January 9, 1931, when it was voluntarily dissolved under Section 105 of the New York Stock Corporation Law (R. 15).

On April 30, 1937 and May 6, 1937, two judgments were entered in the United States Customs Court, allowing the

various protests filed by Rayon #1 and Nyrayco prior to their dissolution. Under these judgments it was determined that refunds were owing to Rayon #1 in the amount of $359,548.96; to Richard Shipping Corporation, as customs broker of Rayon #1, in the sum of $2,983.75; and to Nyrayco in the sum of $30,809.75 (R. 16). Checks for the refund of the excessive customs duties were drawn by G. F. Allen, Chief Disbursing Officer of the United States, on the Treasurer of the United States payable to the order of Rayon #1, Richard Shipping Corporation and Nyrayco (R. 16). Delivery of these checks was not made, however, by the Collector of Customs because the importing corporations, Rayon #1 and Nyrayco and Rayon #2, the successor corporation, had been dissolved and the checks were turned over to the General Accounting Office (R. 17).

Demands for payment were repeatedly made upon the General Accounting Office by the various corporations and their liquidating directors, who offered to sign consents and releases if payment were made either to the successor corporation, Rayon #2, or to the predecessor corporations, Rayon #1 and Nyrayco, as the Government might prefer (R. 17, 18).

This office, however, refused to approve of the delivery of the checks or payment to anyone (R. 17, 18). After extensive negotiations and correspondence over a number of years, suit was finally brought in the Court of Claims (R. 20).

Three separate actions in the Court of Claims were instituted on April 29, 1943 by Rayon #2 and its liquidating directors, by Rayon #1 and its liquidating directors, and by Nyrayco. The actions were consolidated and tried together (R. 20). Although the Government had had the matter under consideration since 1937, on the trial it offered no evidence of any kind to controvert the docu-

mentary and oral evidence given on behalf of the plaintiffs.

In its brief and argument before the Court of Claims, the Government conceded the validity of the transfer of assets in 1930. including all refund claims, to Rayon #2 and admitted its obligation to pay $362,482.71 on account of the refund claims originally filed by Rayon #1 and its customs broker (R. 23).

The Government did not dispute that Nyrayco had overpaid its customs duties by $30,809.75, but took the technical position that the judgment entered in Nyrayco's name in the Customs Court in 1937 was void because of its involuntary dissolution in 1935 (which, incidentally, was five years after transfer of its assets to Rayon #2 in 1930).

The Court of Claims overruled these technical objections, pointing out that decisions of the New York courts and the Customs Court itself had held that, under New York law, even corporations dissolved for non-payment of taxes could maintain suit (R. 24, 25).

The Court also pointed out that any doubt as to the meaning of the New York Tax Law dealing with involuntary dissolution of corporations was dispelled by the adoption on April 19, 1941 of an amendment to the Tax Law reading as follows:

> "The provisions of Section 29 of the General Corporation Law shall apply to any corporation heretofore or hereafter dissolved under this section."

The Court of Claims then considered the question of interest and wrote (R. 25):

> "This amendment had the effect of removing any defects and uncertainty. It made clear the right of corporations dissolved under the tax law to maintain suits or be sued. By its terms it was made applicable to corporations theretofore dissolved. After April 19,

1941, the effective date of the amendment, there is no reason why Rayon #2, the owner of the two judgments, should not receive interest calculated from such date.

"We can fully appreciate the desire of the General Accounting Office to protect the interests of the Government. This is as it should be. But the nation as well as the individual should be and usually is anxious to settle its just obligations. It has been known since 1937 that this money does not belong to the Government. In the confusion care was naturally exercised. But all the interested claimants seem anxious to get the matter settled. Various offers were made which were rejected without any counter suggestion. These included offer of transfer or assignment and request for suggestions by liquidating directors and trustees. It was not until 1942 that suit in this Court was suggested by the defendant.

"It rather seems if officials of the General Accounting Office had been desirous of getting the matter disposed of they could have permitted transfers and assignments by all interested parties, or if this was not sufficient it could have suggested at an earlier date, that an additional suit would be necessary. At any rate, four years seems a reasonably sufficient time to determine ownership of all parties. This is an added reason, at least persuasive, why the judgments of the Customs Court should bear interest after April 19, 1941, when all question of the capacity of plaintiffs to maintain suit was removed by the amendment to the New York law."

Specification of Errors

1. The Court of Claims erred as to the time from which interest was to run by erroneously fixing April 19, 1941 instead of the dates on which the checks were drawn.

2. The Court of Claims erred in failing to fix as the starting dates for the allowance of interest the dates on which

the checks were drawn, payment of which was withheld by the Comptroller General.

Reasons for Granting the Writ

The Government has indicated that it intends to ask for a writ of certiorari to review the action of the Court of Claims in allowing any interest. If the question of interest is to be reviewed by this Court, a writ of certiorari should be granted to the petitioners as well, for the ruling of the Court of Claims, although correct in awarding interest, was erroneous insofar as it fixed the date from which interest ran as April 19, 1941 instead of the earlier dates on which the checks were drawn.

The Act of March 3, 1875, 31 U. S. C. 227, provides that interest should run "for the time it [payment of a judgment] has been withheld from the plaintiff" by the Comptroller General.

American Potash Co. v. *U. S.*, 80 C. Cls. 160, 8 F. Supp. 717 (1934), the principal authority relied on by the petitioners, held that under the above section, interest should run from the date of the issuance of the checks, payment of which was later stopped by the Comptroller General. Numerous other cases, e. g., *United States* v. *New York, C. & St. L. R. Co.*, 32 F. (2d) 887 (C. C. A. 6th); *United States* v. *La Grange Grocery Co.*, 31 F. (2d) 297 (N. D. Ga.); *Colorado Condensed Milk Co.* v. *United States*, 70 C. Cls. 671, 48 F. (2d) 682; *American Steam Conveyor Corp.* v. *United States*, 81 C. Cls. 151, 10 F. Supp. 571, cert. denied 296 U. S. 599; *Helvetia Milk Condensing Co.* v. *United States*, 77 C. Cls. 743, 3 F. Supp. 662, cert. denied 290 U. S. 671, have held that where the Act of March 3, 1875 applies, interest runs from the time payment of the amount due by the United States has been withheld from the plaintiff.

The date of April 19, 1941, adopted by the Court of Claims as the date from which interest was to begin to run, has no proper relation to the question. It was merely the date on which an amendment to the New York Tax Law removed certain possible ambiguities as to the rights of involuntarily dissolved corporations to sue. The ruling of the Court of Claims is in conflict with its own prior rulings and the rulings of the District and Circuit Courts above cited, since payment had been withheld by the Comptroller General since 1938 (R. 17).

In the instant case there was never any question as to the capacity and power of Rayon #2 to maintain suit. This corporation had been voluntarily dissolved and had acquired the customs claims of Rayon #1 and Nyrayco prior to its dissolution and prior to the dissolution of these predecessor companies.

Moreover, while it is true that Nyrayco was involuntarily dissolved, the judgments entered in the name of Nyrayco only related to $30,809.75. The remainder of the claim involved in this action arose out of the customs refund rights of Rayon #1, involving judgments of the Customs Court amounting to $362,482.71. There was never any question as to the capacity of Rayon #1 to sue in the Customs Court for that corporation had been voluntarily dissolved and the Government itself recognized before the Court of Claims that there was an unquestioned obligation to pay this sum. Accordingly, even if the April 19, 1941 date might have some significance in relation to the Nyrayco claim, it had no possible relation to the refund claim based on the protests originally filed by Rayon #1, and interest should have been allowed on that claim, at least as far back as the time when the checks in payment of the Customs Court judgments were drawn and withheld.

Even as to the Nyrayco claim, however, there was no justification for delaying the running of the interest until April 19, 1941, since the law of New York at the time of the judgment and thereafter was that Nyrayco never lost its capacity to sue and a judgment entered under the circumstances herein involved could not properly be attacked (*Klytia Corp.* v. *United States*, 72 T. D. 1124; *Interstate Trucking Co.* v. *Manufacturers Trust Co.*, N. Y. L. J. May 2, 1935, p. 2260; *Douglas* v. *Perlstein*, 170 Misc. (N. Y.) 561; particularly where prior to the judgment no objection had been made on the ground of Nyrayco's involuntary dissolution (a matter of public record). (*United States* v. *Insurance Companies*, 89 U. S. 99, 101; *Society for Propagation of the Gospel* v. *Town of Pawlet*, 4 Pet. (29 U. S.) 480, 501; *Commission* v. *Havemeyer*, 296 U. S. 506, 519.)

Conclusion

WHEREFORE, in the event this Court grants the petition of the United States for a writ of certiorari the petitioners respectfully submit that this cross-petition for a writ of certiorari should likewise be granted.

Dated: May 1, 1946.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1185

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL.,

Petitioners,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below.

The opinion of the Court of Claims has not yet been reported.

Jurisdiction

The judgment of the Court of Claims was entered on February 4, 1946 (R. 27). The petition for certiorari was filed May 1, 1946. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925.

Statement of Case. Question Presented. Specification of Errors

A sufficient statement of the case, the question presented and the specification of errors will be found in the accom-

panying petition and in the interest of brevity will not be repeated.

Statute Involved

The provisions of the Act of March 3, 1875, 31 U. S. C. 227, are printed in Appendix A, *infra*, page 22.

ARGUMENT

Point I

The portion of the Decision for which review is sought is in conflict with numerous decisions of the District and Circuit Courts and of the Court of Claims itself, in failing to award interest as required by 31 U. S. C. Sec. 227 for the entire period payment of the prior judgments was withheld.

The Government has the use of the $393,292.46 paid to it as excessive customs duties for more than sixteen years, the last payments of customs duties having been made in 1929 (R. 10).

The exact amount due was determined when the customs duties were reliquidated pursuant to the judgments of the Customs Court dated April 30, 1937 and May 6, 1937 (R. 16).

Following this reliquidation, checks were drawn by the Chief Disbursing Officer of the United States on the Treasurer of the United States on various dates from August 4, 1937 to February 3, 1938 in the aggregate amount of $393,292.46, which checks were transmitted to the General Accounting Office for lawful disposition (R. 16, 17).

However, in 1938 the General Accounting Office refused to deliver the checks (R. 17), and after years of fruitless negotiations with the General Accounting Office, this action was instituted in the Court of Claims.

The provisions of the Act of March 3, 1875, 31 U. S. C. Section 227, are clear that where interest is to be awarded against the United States, it shall be "from the time it [payment of the prior judgment] has been withheld from the plaintiff."

In every prior case in which interest was allowed under the Act of March 3, 1875, by the Court of Claims and the District and Circuit Courts, interest was held to run from the date when payment was withheld by the Comptroller General, regardless of whether he in good faith believed he was justified in withholding payment.

United States v. *New York, C. & St. L. R. Co.*, 32 F. (2d) 887 (C. C. A. 6th);

United States v. *La Grange Grocery Co.*, 31 F. (2d) 297 (N. D. Ga.);

American Potash Co. v. *United States*, 80 C. Cls. 160, 8 F. Supp. 717;

American Steam Conveyor Corp. v. *United States*, 81 C. Cls. 151, 10 F. Supp. 571, cert. denied 296 U. S. 599;

R. J. Reynolds Tobacco Co. v. *United States*, 82 C. Cls. 545, 13 F. Supp. 425;

Colorado Condensed Milk Co. v. *United States*, 70 C. Cls. 671, 48 F. (2d) 682;

Helvetia Milk Condensing Co. v. *United States*, 77 C. Cls. 743, 3 F. Supp. 662, cert. denied 290 U. S. 671;

Stewart & Co. v. *United States*, 71 C. Cls. 126;

Standard Dredging Co. v. *United States*, 71 C. Cls. 218.

We have found no authority to the contrary.

A

THE DATE OF APRIL 19, 1941 ADOPTED BY THE COURT OF CLAIMS AS THE DATE FROM WHICH INTEREST WAS TO BEGIN TO RUN HAS NO RELATION TO THE QUESTION OF INTEREST ON THE JUDGMENTS OF THE CUSTOMS COURT IN FAVOR OF RAYON NO. 1 IN THE SUM OF $362,482.71.

April 19, 1941, the date selected by the Court of Claims as the date from which interest was to run, was the date when the Governor of New York approved an amendment to the New York Tax Law, removing all possible question whether corporations previously involuntarily dissolved under the New York Tax Law for non-payment of franchise taxes had the right to maintain suits.

This date is totally irrelevant as to the claim for $362,482.71, based on the Customs Court judgments in favor of Rayon #1, for no question as to capacity to sue has ever existed in relation to Rayon #1 and its successor, Rayon #2, since these corporations were not dissolved involuntarily under the Tax Law but were voluntarily dissolved in accordance with Sec. 105 of the New York Stock Corporation Law (R. 15).

The right of *voluntarily* dissolved New York corporations to maintain suit to collect their assets has never been disputed (New York Stock Corporation Law, Sec. 105, Sub. 8).

In fact, the Government has never questioned the validity of the Customs Court judgments entered on the Customs Claims of Rayon #1, and in its brief in the Court of Claims the Government not only conceded that payment must be made of the sum of $362,482.71, but also that there was no objection to having judgment run in favor of Rayon #2, the successor in interest of Rayon #1.

The only question raised by the Government in the Court of Claims (aside from interest) was as to the validity of the Customs Court judgments for $30,809.75 entered in

favor of Nyrayco after Nyrayco had been dissolved involuntarily for non-payment of New York franchise taxes. The Court of Claims agreed that the judgments in favor of Nyrayco were valid (R. 25) but held that interest should run from the date of the final amendment of the Tax Law since by that date at least the General Accounting Office should have realized that there was no justification for further withholding (R. 25, 26).

But since the $362,482.71 of Rayon #1 customs claims was not in the slightest degree affected by any question of capacity to sue, and as the validity of the Customs Court judgments entered on these claims has never been questioned, it is plain that the date of April 19, 1941, is totally irrelevant, and that interest should have been allowed, at least on the claim for $362,482.71 from the date payment was withheld by the General Accounting Office.

The Court of Claims in its discussion of interest apparently failed to discriminate between the much larger judgments of Rayon #1 (whose validity even the Government never impugned) and the much smaller Nyrayco claim. The only reason given for not allowing interest from 1938 was a reference to "the maze of reorganizations and transfers" (R. 25).

This statement, we respectfully submit, is totally unsupported by the record. There was but one reorganization, as part of which there was one transfer of all assets by Rayon #1 and by Nyrayco, to Rayon #2, the successor corporation (R. 10, 14).

So simple was the factual situation as to reorganization and so clearly proved by the documentary record that the Government did not even offer any evidence at the hearings, and the unequivocal findings of the Hearing Commissioner were accepted by all parties.

Moreover even where a complicated reorganization situation has existed interest has been allowed (*Aluminum Company of America* v. *United States*, 87 C. Cls. 96, 97).

Certainly, the April 1941 amendment to the Tax Law had not the remotest relation to the Government's obligation to pay the Customs Court judgments in favor of Rayon #1 amounting to $362,482.71, and interest should have been allowed at least on this amount from the earlier date when the General Accounting Office improperly withheld payment.

B

THE DATE OF APRIL 19, 1941 HAS NO PROPER RELATION EVEN TO THE CLAIM BASED ON NYRAYCO'S JUDGMENTS OF $30,809.75.

Even as to the $30,809.75, involved in the Nyrayco Customs Court judgments there was no justification for delaying the running of interest to April 19, 1941.

While the Court of Claims felt that by that date any conceivable question as to the validity of the Nyrayco judgments was removed, the law was clear, and the Court of Claims so held, that these judgments entered in 1937 were valid and not subject to attack (R. 23-25).

(1)

Under New York law, Nyrayco at times had capacity to sue

Nyrayco had instituted suit in the United States Customs Court on its claims years prior to its dissolution. It had assigned all its assets, including these claims, to Rayon #2, in 1930, as part of the corporate reorganization, long prior to its dissolution.

The fact that in 1937, when the judgments were finally entered in the Customs Court, Nyrayco had ceased to do business and had been dissolved by proclamation under the New York Tax Law for non-payment of franchise taxes, did

not in any way affect the validity of the Customs Court judgments, which actually belonged to Rayon #2.

The amendment to the Tax Law of 1941 merely clarified what had previously been law.

While in 1937, when the Customs Court judgments were entered, Sec. 203-a of the Tax Law providing for the involuntary dissolution of corporations failing to pay franchise taxes did not expressly mention suits by such corporations, Sec. 29 of the New York General Corporation Law, which was in effect at the time of the dissolution of Nyrayco and at all times since, read as follows:

> "Upon the dissolution of a corporation for any cause and whether voluntary or involuntary its corporate existence shall continue for the purpose of paying, satisfying and discharging any existing liabilities or obligations, collecting and distributing its assets, and doing all other acts required to adjust and wind up its business and affairs, and it may sue and be sued in its corporate name. • • •"

The authorities both prior to 1937 and thereafter held that suit to collect its assets might be maintained by a corporation dissolved under the Tax Law.

The Supreme Court of New York in *Interstate Trucking Co., Inc.* v. *Manufacturers Trust Co.* (N. Y. Law Journal, May 2, 1935, p. 2260), wrote:

> "This action is brought by a corporation dissolved on December 16, 1929, pursuant to Section 203-A of the Tax Law for non-payment of franchise taxes. The defendant moves to dismiss the complaint on the ground that the plaintiff has no capacity to sue and also asks alternative relief. • • •
>
> "In 1932, Section 29 of the General Corporation Law was amended to provide that 'upon the dissolution of a corporation for any cause, and whether voluntary or involuntary, its corporate existence shall continue for the purpose of • • • collecting and dis-

tributing its assets * * * and it may sue and be sued in its corporate name'. The defendant argues that this section has no application in view of the fact that section 6 of the General Corporation Law provides that if there be in any other corporate law a provision conflicting with any provision of the General Corporation Law or of the Stock Corporation Law, the provisions of such other corporate law shall prevail. The court is of the opinion that section 6 does not apply here, there being no conflict between the provisions of section 203-a of the Tax Law either in its 1929 or 1932 form.

"The motion to dismiss for lack of capacity to sue is accordingly denied. * * *"

Accord:

Klytia Corp. v. *United States*, 72 T. D. 1124 (1937);
Douglas v. *Perlstein*, 170 Misc. (N. Y.) 561 (1939);
London Lightin Wares Corp. v. *Norge Realty Corp.*, N. Y. Law Journal, April 23, 1938, p. 1968, Col. 6 (Sup. Ct.);
Marford Direct Mailing Co. Inc., v. *Socony Vacuum Oil Co., Inc.*, N. Y. Law Journal, December 8, 1938, p. 2027, Col. 2 (Sup. Ct.).

In 1939, some years after the entry of the judgments of the Customs Court here involved, one of the four intermediate appellate courts of the State of New York suggested, in *Matter of Eisenstadt, Inc.* v. *Heffernan*, 256 App. Div. 488, that Section 29 of the General Corporation Law did not apply to corporations dissolved for non-payment of franchise taxes under Section 203-a of the Tax Law. That court, while not holding that such corporations were wholly dead, felt that the Tax Law was intended to penalize them. That case was affirmed without opinion by the Court of Appeals, 283 N. Y. 578, but respondent had urged a number of other grounds for affirmance, and there being no opinion in the Court of Appeals, it is impossible to know on what ground the affirmance was ordered.

To remove the doubts raised by the *Eisenstadt* case, in 1940 the next session of the New York Legislature at the suggestion of the Deputy Secretary of State of New York promptly passed a clarifying law, expressly providing that Section 29 of the General Corporation Law applied to corporations dissolved under the Tax Law, *thus approving the interpretation given by the earlier New York cases.*

To avoid any question that this applied to corporations previously dissolved, the Legislature on April 19, 1941, adopted a further amendment to the Tax Law, making it clear that the provisions of the General Corporation Law applied to any corporation "heretofore or hereafter dissolved under this section."

The Court of Claims itself held (R. 24, 25) that at the time of the entry of the judgments in favor of Nyrayco, the New York law permitted such a corporation to sue and that this has continued to be the New York law. Accordingly, under the authorities, regardless of any question of the good faith of the General Accounting Office, interest ran from the time payment of the judgments was withheld.

(2)

There was no justification for non-payment of the Nyrayco judgments in view of the Government's failure to raise any objection based on Nyrayco's dissolution prior to entry of the judgments in the Customs Court.

Nyrayco's dissolution was a matter of public record. Yet the Government never raised the question until years after the Customs Court judgments had been entered and after checks in payment for such judgments had been drawn and deposited in the Treasury trust fund in Nyrayco's name.

It is well settled that a defense that a plaintiff is not a corporation must be raised by affirmative plea prior to judg-

ment, and that a judgment cannot be collaterally attacked where this defense is not raised.

> "Having failed to do so [to raise the defense in the trial court that the plaintiff was a dissolved corporation], the judgment rendered against him in the name of the defendant in error [the corporation] was a binding and valid judgment, * * *. The judgment in favor of the defendant in error was *res adjudicata* of all the defenses which were or could have been interposed by the plaintiff in error [the defendant] including the capacity of the defendant in error to maintain its suit. (Citing cases.)" *(Commercial Loan and Trust Co.* v. *Mallers,* 242 Ill. 50 at 53.)

Accord:

United States v. *Insurance Cos.,* 22 Wall. (89 U. S.) 99, 101;
Commission v. *Havemeyer,* 296 U. S. 506, 519;
Morse Arms Mfg. Co. v. *United States,* 16 C. Cls. 293;
Basch v. *United States,* 52 C. Cls. 134, 142;
Philippine Sugar Estates Development Co. v. *United States,* 39 C. Cls. 225, 237;
Hebrew Congregation, etc. v. *United States,* 6 C. Cls. 241, 245;
Concordia Savings and Aid Ass'n. v. *Read,* 93 N. Y. 474.

See also:

Pyrogravure Co. v. *Staber,* 30 Misc. (N. Y.) 658;
New York Rules of Civil Practice, Rule 93, Subdivision 2.

Plainly, therefore, the Government's belated attack on the judgments in the name of Nyrayco was technically as well as equitably without merit, and so the Court of Claims held.

The entry of the Customs Court judgments in 1937 was a permanent bar to any future objection based on capacity

to sue, and that being so, the General Accounting Office's refusal to allow payment in 1938 caused interest to run from that time. The mere fact that the General Accounting Office erroneously believed in good faith that there was a legal basis for refusing payment does not relieve the Government from the obligation to pay interest. That was the situation in all of the cases where interest was allowed.

In any event, even if there had been any doubt prior to April 19, 1941, with respect to the claim of Nyrayco, there was no basis for refusing to pay the Customs Court judgments relating to the claims of Rayon #1, as to which even the Government, after years of negotiation, could not advance even a colorable defense.

Conclusion

It is respectfully submitted that in the event this Court grants the petition of the United States for a writ of certiorari, this cross-petition for a writ of certiorari should likewise be granted.

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APPENDIX A

The Act of March 3, 1875, 31 U. S. C. 227, dealing with interest when a judgment is unpaid, provides as follows:

"Sec. 227. Offsets against judgments against United States—When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refused to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff."

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No. 96

In the Supreme Court of the United States

OCTOBER TERM, 1946

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Art. 862, pp. 536–537	7
Customs Regulations, 1937:	
Art. 861, p. 490	7
Customs Regulations, 1943:	
Art. 17.4, p. 327	7
Art. 24.36, p. 456, ftn. 6	7
Opinions of the Attorney General:	
7 Op. Atty. Gen. 523	7

709474—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 96

N. Y. RAYON IMPORTING CO., INC. (#2) AND ALFRED L. ROSE, NORMAN S. GOETZ, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 21–27) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on February 4, 1946 (R. 27). The petition for a writ of certiorari was filed May 1, 1946. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether the Act of March 3, 1875, *infra*, which provides that interest may be recovered from the United States where the Comptroller General suspends payment of a judgment in order to litigate an asserted counterclaim on behalf of the United States and is unsuccessful therein, has any applicability to the instant case.

STATUTE INVOLVED

The Act of March 3, 1875, 18 Stat. 481, as amended by the Act of March 3, 1933, c. 212, Title II, § 13, 47 Stat. 1516, 31 U. S. C. 227, provides:

> When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the

set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff.

STATEMENT

The facts of the instant case are fully stated in the Government's petition for a writ of certiorari in *United States* v. *N. Y. Rayon Importing Co., Inc.* (#2) *and Alfred L. Rose, Norman S. Goetz, Walter Mendelsohn, and Bernard D. Lang as Liquidating Directors and Trustees of N. Y. Rayon Importing Co., Inc.* (#2), No. 94, October Term, 1946 (pp. 2–11). As shown therein, this was one of three related suits filed in the Court of Claims for the purpose of ascertaining the

party or parties entitled to a fund which had been set up as an outstanding liability in the Treasury by direction of the General Accounting Office. The fund had been established, pursuant to statute, after the Collector of Customs had refused to turn certain customs duty overpayment checks over to claimants, including cross-petitioners, but had instead forwarded the checks to the General Accounting Office "for lawful disposition" (R. 17).

It should be noted that no concession was made by the Government in the Court of Claims as to the ownership of the customs duty overpayment fund, contrary to cross-petitioners' statement (Cross-petition, p. 6). The Court of Claims proceedings followed a suggestion by the Comptroller General that a final judgment by a court of competent jurisdiction be obtained to conclude the issue of ownership (R. 18). The Government obviously had no interest in choosing between the contesting claimants in the court below except to the extent that it disputed the right of Nyraco to any recovery by reason of the involuntary dissolution of that corporation prior to the Custom Court proceedings on the customs duty overpayment claims. For the same reason, cross-petitioners' statement, that the Government "* * * offered no evidence of any kind to controvert the * * * evidence given on behalf of the plaintiffs * * *" (Cross petition, pp. 5–6), is also without significance.

ARGUMENT

1. The sole point raised by cross-petitioners is that the provisions of the Act of March 3, 1875, *supra*, "* * * where the Act * * * applies * * *", (Cross petition, p. 8) require a calculation of interest from the time that payment of the amount owed by the United States on a judgment has been withheld from a claimant. The short answer is, that the Act of March 3, 1875, *supra*, is entirely inapplicable in the circumstances of this case.

The Act of March 3, 1875, *supra*, prescribes the conditions which must be met before interest may be recovered against the United States under its provisions: (1) The claimant must have a final judgment against the United States and must present it to the Comptroller General for payment; (2) it is the duty of the Comptroller General to withhold payment of the judgment, as an offset, if an indebtedness of the claimant to the United States is asserted; (3) if the asserted indebtedness is denied by the claimant, it is the duty of the Comptroller General to cause suit to be brought, if suit against the claimant has not already been instituted; (4) in such suit, if judgment is rendered against the United States in the whole or part of the amount initially withheld by the Comptroller General, interest may be paid on the balance from the time of the initial withholding.

Applying these statutory conditions to the circumstances of cross-petitioners' claim, it is first doubtful that the decision of the Customs Court is a "judgment" within the meaning of the Act of March 3, 1875, *supra*. It is a declaratory decree, *Brooks* v. *Mandel-Witte Co.*, 54 F. 2d 992, 994 (C. C. A. 2), and not a money judgment. However, even assuming that the Customs Court decree is a judgment within the meaning of the statute, none of the other statutory conditions can be met by cross-petitioners. The Comptroller General did not refuse to turn over the customs duty overpayment fund because of any cross debt asserted by the United States.[1] Since no cross debt was involved, no suit by the United States against cross-petitioners was ever instituted or reduced to judgment. Thus, it is clear from the plain language of the statute that it is entirely inapplicable to the circumstances of the instant case. Cf. *Richmond, Fredericksburg & Potomac R. R. Co.* v. *United States*, 95 C. Cls., 244, 259; *Castell* v. *United States*, 83 C. Cls., 222, 235. Cross-petitioners' reference to the Act of March 3, 1875 is merely a recognition of the rule that interest may not be awarded against the United

[1] As noted in the Government's petition, the Collector of Customs was the prime mover in stopping the delivery of the customs duty refund checks after they had been drawn (R. 17). The General Accounting Office received the checks from the Collector "for lawful disposition" with full notice of his difficulties as to the ascertainment of the proper owner of the fund (Government's petition in No. 94, p. 7).

States in the absence of express statutory authorization (See Government's petition in No. 94, pp. 12–13) and is a strained attempt to show a statutory basis for an exception to the rule, an exception so obviously inapplicable that it was not even utilized by the court below.

2. The inapplicability of the Act of March 3, 1875, *supra*, to the circumstances herein, apparent on a reading of the statute, is emphasized by specific regulations applicable to custom court decisions and reliquidation of entry proceedings. Regulations issued by the Treasury Department specifically prohibit payment of interest on such decisions or on amounts paid pursuant to reliquidation. See Customs Regulations, 1931, Art. 862, pp. 536–537; Customs Regulations, 1937, Art. 861, p. 490; Customs Regulations, 1943, Art. 17.4, p. 327, and Art. 24.36, p. 456, ftn. 6.[2] No exception to the prohibition of these customs regulations is provided by the appropriation acts which, as found by the court below, covered the refunds here involved (R. 17). Both such acts (Act of May 14, 1937, 50 Stat. 137, 142; Act of June 25, 1938, 52 Stat. 1114, 1149) are silent on the question of the allowance of interest on refunds. See 7 Op. A. G. 523, 525.

[2] The historical background of these regulations is shown in *White* v. *Arthur*, 10 Fed. 80 (S. D. N. Y.); *Stephani's Case*, 26 Int. Rev. Rec. 313, 314; cf. *United States* v. *Sherman*, 98 U. S. 565.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that the cross-petition for a writ of certiorari is without merit and should be denied.

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as of March 1, 1930, the New York Secretary of State issuing a certificate of dissolution on that date.

Rayon #2 was voluntarily dissolved on January 9, 1931, in accordance with New York law. Nyrayco was dissolved on December 16, 1935, by proclamation for nonpayment of New York franchise taxes.

In 1937, long after these three corporations were dissolved, the Customs Court rendered decisions sustaining the protests which Rayon #1 and Nyrayco had filed in connection with the duties on rayon yarn imported between 1925 and 1929. A reliquidation of the customs entries was directed. On reliquidation, the Collector of Customs ascertained that a refund of $362,482.71 was payable to Rayon #1 and $30,809.75 to Nyrayco. Checks payable to those corporations were drawn, but since the corporations had been dissolved the Collector caused the checks to be transmitted to the General Accounting Office "for lawful disposition." Representatives of Rayon #2 thereafter requested the General Accounting Office to deliver these checks to them; this request was denied and the Comptroller General deposited the proceeds of the checks in the Treasury in a trust fund entitled "Outstanding Liabilities 1938", pursuant to law.[2]

Several unsuccessful attempts were made by the representatives of the three dissolved corporations to obtain the money in the trust fund. First, a consent decree was entered in a declaratory judgment proceeding in the Supreme Court of the State of New York adjudicating that, as among the three dissolved corporations, Rayon #2 was the owner of these customs refunds or the proceeds thereof.[3] But the General Accounting Office refused to

[2] Section 21 of the Act of June 26, 1934, c. 756, 48 Stat. 1235, 31 U. S. C. § 725t.

[3] This non-adversary proceeding only affected rights as between Rayon #1 and Nyrayco, on the one hand, and Rayon #2 on the other. It provided the Government no protection as against the other possible claimants who were later impleaded and cited in the Court of Claims action. See footnote 4.

make payment when confronted with this decree. Thereafter, on February 26, 1943, attorneys for the three dissolved corporations suggested to the Comptroller General that the money be released to Rayon #1 and Nyrayco with the consent of Rayon #2, each corporation being represented by its director or directors as trustees in liquidation. The Comptroller General rejected this proposal and stated that payment would be permitted only upon final judgment by a court of competent jurisdiction concluding the issue of ownership. He suggested that a suit be brought for this purpose in the Court of Claims.

Rayon #2 and its liquidating directors and trustees then brought this suit in the Court of Claims, claiming that Rayon #2 continued to exist for the purpose of collecting and distributing its assets and that it was the owner of the funds in issue. Rayon #1 and Nyrayco also brought suits in the Court of Claims; they claimed the amounts of their respective refunds and alleged that ownership remained in them. After consideration of all three claims,[4] the court held that the rights of Rayon #1 and Nyrayco had been taken over by Rayon #2 and its liquidating directors and trustees, who were thus entitled to recover the amounts held in trust by the United States. 64 F. Supp. 684. As a part of its judgment, however, the Court of Claims awarded 6% interest on the total fund, such interest to run from April 19, 1941, the date of an amendment to the New York Tax Law which retroactively clarified the capacity to sue of involuntarily dissolved corporations.[5]

[4] The three suits were consolidated. In all three cases, the Societé Pour Nouveaux Placements de Capitaux was impleaded as plaintiff. It filed a disclaimer of interest and the Court of Claims dismissed "all claims of interest" which it had. Several other persons and companies were named by the United States as having possible claims, but none of them asserted any claims or filed any intervening petitions; the court dismissed "all claims of interest" as to them.

[5] April 19, 1941, was the date when the Governor of New York approved an amendment to § 203a of the New York Tax Law, remov-

We issued a writ of certiorari in No. 94, on petition of the United States, to review the action of the Court of Claims in awarding such interest. At the same time, we issued a writ of certiorari in No. 96 on a cross-petition of Rayon #2 and its liquidating directors and trustees urging that interest should have been allowed from the time of the issuance of the refund checks in 1937 and 1938 rather than from April 19, 1941.

In our opinion, § 177 (a) of the Judicial Code prohibits the award of any interest under the circumstances of this case. Section 177 (a) provides that "No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, . . ." As we recently pointed out in *United States* v. *Thayer-West Point Hotel Co.*, No. 106, decided Jan. 20, 1947, this provision codifies the traditional rule regarding the immunity of the United States from liability for interest on unpaid accounts or claims. In other words, in the absence of constitutional requirements, interest can be recovered against the United States only if express consent to such a recovery has been given by Congress. And Congress has indicated in § 177 (a) that its consent can take only two forms: (1) a specific provision for the payment of interest in a statute; (2) an express stipulation for the payment of interest in a contract duly entered into by agents of the United States. Thus there can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where

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ing all possible question whether corporations which had previously and involuntarily been dissolved under the New York Tax Law for non-payment of franchise taxes had the right to maintain suits. This had relevance, however, only to Nyrayco. Rayon #1 and Rayon #2 were voluntarily dissolved in accordance with § 105 of the New York Stock Corporation Law. Their right to maintain suit to collect their assets was never questioned.

the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed. *Tillson* v. *United States*, 100 U. S. 43; *United States* v. *Thayer-West Point Hotel Co.*, *supra*.

Tested by those standards, the award of interest in this case cannot be sustained. There is obviously no contractual stipulation involved. And the appropriation statutes which cover the refunds here in issue contain no provision whatever for the recovery of interest. Act of May 14, 1937, 50 Stat. 137, 142; Act of June 25, 1938, 52 Stat. 1114, 1149. The traditional immunity of the United States, as codified in § 177 (a), accordingly applies.

The Court of Claims, without making a reference to § 177 (a), sought to justify its award of interest on what it thought "would be right or just." It felt that the officials of the General Accounting Office had delayed too long in determining the ownership of the refund claims and that, at the very least, they could have suggested at an earlier date that a suit in the Court of Claims was necessary. Inasmuch as it was known since the time of the Customs Court's decisions in 1937 that the money did not belong to the Government, the Court of Claims believed that it was only fair that the true owners get interest from the time when all defects and uncertainties were removed in New York as to the capacity of dissolved corporations to maintain suits or to be sued.*

But assuming that the equities of the situation all favor the owners of the refund claims, the Court of Claims did

* Rayon #2 and its liquidating directors and trustees claim that the date of April 19, 1941, has no relevance whatever to the claim of Rayon #1. See footnote 5. And they claim that this date has no proper relation to the Nyrayco claim since the Government made no objection to Nyrayco's capacity to sue until several years after the decisions of the Customs Court and after checks in its name had been drawn by the Government.

not thereby acquire power to carve out an implied exception to the plain words of § 177 (a). Had Congress desired to permit the recovery of interest in situations where the Court of Claims felt it just or equitable, it could have so provided. The absence of such a provision is conclusive evidence that the court lacks any power of that nature. Indeed, any other conclusion would permit the Court of Claims to supply the consent which only Congress can give to the imposition of interest against the United States.

By the same token, if we assume that the officials of the General Accounting Office unreasonably delayed the determination of ownership of the funds, such action or inaction could not operate as a consent on the part of the United States. *Tillson* v. *United States, supra.* It has long been settled that officers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court in the absence of some express provision by Congress. *Carr* v. *United States,* 98 U. S. 433; *Stanley* v. *Schwalby,* 162 U. S. 255; *Minnesota* v. *United States,* 305 U. S. 382; *United States* v. *Shaw,* 309 U. S. 495. The same rule applies here. Only Congress can take the necessary steps to waive the immunity of the United States from liability for interest on unpaid claims. Cf. *Smyth* v. *United States,* 302 U. S. 329, 353.

The owners of the refund claims, however, seek to avoid the effect of § 177 (a) by urging that it applies only to original claims which have not previously been reduced to judgment. This proceeding, it is said, is based upon the pre-existing judgments of the Customs Court, thereby precluding the application of § 177 (a). We do not pause here to inquire into the nature and effect of the decisions rendered by the Customs Court or the jurisdiction of the Court of Claims to entertain suits based upon pre-existing judgments. It is enough to note that the traditional rule embodied in § 177 (a) is a complete one covering all types

of claims, including those arising out of pre-existing judgments. As we have seen, any exception to that rule must be grounded upon an express provision in a statute or contract. It follows that any exception relating to pre-existing judgments must be traced to specific language in a contract or some other statute. Section 177 (a) by itself warrants no such exception. Cf. 31 U. S. C. § 226.

In this connection, the owners of the refund claims point to the Act of March 3, 1875, as amended in 1933.[7] That Act directs the Comptroller General to withhold payment from a judgment creditor of the United States, if such

[7] Act of March 3, 1875, 18 Stat. 481, as amended by the Act of March 3, 1933, c. 212, Title II, § 13, 47 Stat. 1516, 31 U. S. C. § 227. This provides:

"When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, the Comptroller General of the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff."

creditor is indebted in turn to the United States, until the indebtedness is satisfied. The Comptroller General is to cause suit to be brought on the Government's cross debt if the judgment creditor denies the indebtedness. The Act then expressly permits 6% interest to be paid to the judgment creditor for the period of the withholding if the Government fails to win its suit and to substantiate its asserted set-off. Thus to that limited extent the Act of March 3, 1875, marks an exception to the traditional rule set forth in § 177 (a). See, for example, *American Potash Co.* v. *United States*, 80 Ct. Cls. 160; *Stewart & Co.* v. *United States*, 71 Ct. Cls. 126.

But the inapplicability of that Act to the facts of this case is at once apparent. The Act relates solely to the situation where the Government asserts a set-off against a judgment creditor. No such set-off is here asserted; there is nothing more than a withholding of payment by the Government until an ascertainment of ownership. In fact, there is no real claim that the situation in the instant case can be fitted within the terms of the Act of March 3, 1875. There is merely an argument that the policy of that Act in providing for the payment of interest where the withholding results from an erroneous belief in the existence of a cross-indebtedness applies with equal force where the withholding results from an attempt to determine ownership of a claim. But the immunity of the United States from liability for interest is not to be waived by policy arguments of this nature. Courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy. We reiterate that only express language in a statute or contract can justify the imposition of such interest. Such language is absent in this instance.

We accordingly reverse the judgment of the Court of Claims in No. 94 to the extent that it includes an award of interest. And since it becomes unnecessary to consider the merits of the cross-claims, the writ of certiorari previously issued in No. 96 is dismissed.

So ordered.